

**BEFORE THE COMMON WEALTH OF KENTUCKY PUBLIC SERVICE
COMMISSION**

In the Matter of)
Application of BellSouth) Case No. 2001-105
Telecommunications, Inc. to Provide)
In-Region InterLATA Services Pursuant)
To Section 271 of the)
Telecommunications Act of 1996)

POST-HEARING BRIEF OF AT&T AND WORLDCOM

AT&T Communications of the South Central States, Inc. (AT&T),
MCI Metro Access Transmission Services, LLC and MCI WorldCom Communications,
Inc., (WorldCom), hereby submit their Post-Hearing Brief in this matter.

INTRODUCTION

Performance measures provide a means for evaluating the level of service the Incumbent Local Exchange Carriers (“ILECs”) offer to Competitive Local Exchange Carriers (“CLECs”). Early in the process of implementing the Telecommunications Act of 1996 (“Act”), the Federal Communications Commission (“FCC”) emphasized that ILECs’ nondiscriminatory support of CLECs is critical to the ultimate development of local competition. (See First Report and Order, *Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 ¶315 (rel. August 8, 1996) (“*Local Competition First Report and Order*”).

Whether entering the local market via interconnection, resale, or the use of unbundled network elements, CLECs depend upon BellSouth’s performance in providing service to their customers. Performance measures are important because they provide a means of monitoring BellSouth’s provision of service to CLECs. Thus, in order for the Commission and CLECs to ensure that BellSouth is meeting its obligations under the

Act, BellSouth must be required to fully and accurately report its performance in accordance with this Commission's Orders.

In this proceeding, BellSouth has proposed that the Commission use BellSouth's "Interim" SQM (AJV-1), which BellSouth asserts is consistent with the Georgia Commission's Order, to evaluate BellSouth's Performance for § 271 purposes. The Commission should not simply defer to the judgments of the Georgia Commission, but rather should make its own evaluation and reach its own determinations concerning the appropriate SQM to be adopted in Kentucky. Moreover, the Florida Commission recently has issued a performance measurement order that provides a much better starting point than does the Georgia order. To make matters worse, BellSouth proposes that the Commission adopt a substantially inferior Permanent SQM (AJV-2) to govern BellSouth's performance post-§271 approval. There is no theoretically sound basis for adopting a performance measurement plan for section 271 purposes and another, weaker, plan for section 251 purposes. In any event, the remedy plan BellSouth has proposed that the Commission adopt on a permanent basis is substantially inferior to that adopted by the Georgia Commission.

The FCC has stated:

We recognize that metric definitions and incumbent LEC operating systems will likely vary among states, and that individual states may set standards at a particular level that would not apply in other states and that may constitute more or less than the checklist requires. *Therefore, in evaluating checklist compliance in each application, we consider the BOC's performance within the context of each respective state. For example, where a state develops a performance benchmark with input from affected competitors and the BOC, such a standard may well reflect what competitors in the marketplace feel they need in order to have a meaningful opportunity to compete. . . .* [I]n making our evaluation we will examine whether the state commission has adopted a retail

analogue or a benchmark to measure BOC performance and then *review the particular level of performance the state has required.*¹

Thus, consistent with FCC guidance, in order to obtain an accurate picture of BellSouth's performance within Kentucky, the Commission should adopt a performance incentive plan and evaluate BellSouth's compliance in the context of that plan before making its recommendation on § 271 relief.

The position taken by BellSouth is inconsistent with the FCC's guidance on this issue and is contrary to the best interest of Kentucky Consumers and CLECs operating in Kentucky. The interdependent nature of the relationship between CLECs and BellSouth makes measuring BellSouth's performance under an appropriate set of performance measurements and standards vital to the development of local competition in Kentucky. Moreover, it is critical to the continued growth and maintenance of competition that the performance enforcement mechanism adopted by this Commission be effective in deterring backsliding on the part of BellSouth should it achieve § 271 approval.

Not only should CLECs' nondiscriminatory access be detected through the use of an appropriate metrics plan, but discriminatory performance by BellSouth should also be deterred. There should be a standard against which CLECs and the Commission can measure performance over time, to detect and correct any degradation of service provided to CLECs. Thus, a monitoring and enforcement program must be associated with the performance measures adopted to ensure that CLECs receive nondiscriminatory access to the BellSouth's OSS.

¹ See Memorandum Opinion and Order, *In the Matter of Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a SouthWestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region InterLata Services in Texas*, 15 FCC Rcd. 18,354 ¶¶ 55-56 (F.C.C. June 30, 2000) (No. CC00-65, FCC00-238) ("*SWBT Texas Order*") (emphasis added).

In addition to adopting a comprehensive set of measures, the Commission should adopt a self-executing remedy plan designed to provide sufficient incentive for BellSouth to meet its obligations under the Act to provide CLECs in Kentucky with service at parity with that it provides itself and to open its local markets to competition. The remedy plan proposed by the CLECs in this proceeding incorporates the criteria identified by the FCC for designing an effective remedy plan and is the appropriate plan for the Commission to adopt in this proceeding.

ISSUES AND ARGUMENTS

ISSUE: THE COMMISSION SHOULD NOT RELY ON BELLSOUTH'S PROPOSED INTERIM SERVICE QUALITY MEASURES ("SQM") FOR PURPOSES OF MAKING ITS SECTION 271 DECISION

The CLECs in this proceeding understand the Commission to have intended in this first phase of this docket to set a permanent Service Quality Measurement Plan ("SQM") for Kentucky. Reviewing the Commission's July 13, 2001 scheduling order, it appears that the Commission anticipated establishing a permanent plan that would not only enable it to evaluate BellSouth's performance in the upcoming 271 evaluation hearing but that would lead directly to the implementation of an SQM and remedy plan for Kentucky. BellSouth seems originally to have interpreted this Order the same way as the CLECs. In Mr. Varner's testimony where, he presents BellSouth's "proposed Permanent SQM" he states:

As the Commission knows, in conjunction with assessing BellSouth's compliance with its 271 obligations, the Commission will use this proceeding to establish a permanent set of performance measurements for Kentucky. (Varner Direct at 4.)

In the hearing, however, BellSouth apparently changed this view, with Mr. Varner saying more or less that BellSouth did not know or care whether the Commission would

establish a permanent SQM and remedy plan in this proceeding, rather BellSouth only wanted to ensure that the Commission used its Georgia Performance Metrics to evaluate BellSouth for compliance with 271 requirements in Kentucky. (*See* Tr. Vol. 1 at 4 – 23; Tr. Vol. 2 at 7 – 12.) The one thing BellSouth emphasized was that the Commission should use the “Georgia metrics” to evaluate BellSouth’s compliance with the requirements of Section 271 and, if the Commission at some point decided to adopt a permanent metrics and remedies plan, then it should adopt the more limited proposal in Mr. Varner’s second exhibit. (Tr. Vol. 1 at 16 – 17; *see also* Varner Direct Exhibits AJV-1, AJV-2.)

For a number of reasons, the CLECs disagree strongly with BellSouth’s proposal(s) in this regard. In the first place, CLECs submit that the Commission should not simply defer to the judgments made by the Georgia Commission as to the appropriate metrics and standards to be applied. CLECs recommend that the Commission use the Florida Commission’s recent performance measurement order as a starting point and then consider changes that may be appropriate based on the filings in this docket. BellSouth’s plan also is flawed because there is no good reason for the Commission to have two plans. The Commission should adopt one performance measures plan and it should use that for both 271 evaluation as well as for a permanent plan that will enable it to evaluate BellSouth’s performance on an on-going basis and incent BellSouth to provide quality service via the self-executing remedies plan. By insisting on two different metrics proposals, BellSouth is, in essence, saying that the Commission should use the more stringent metrics for 271 evaluation (while the FCC/outside world is watching) and then

revert to a less stringent set of metrics (once no one but the CLECs will be paying strict attention to the reporting).

Adopting one plan for 271 evaluation and a more watered down SQM and remedy plan as Kentucky's permanent plan would be nonsensical and a slap to competitive providers in the Commonwealth. By adopting any given metric, the Commission is endorsing the importance of that measurement to the process of assessing whether the market is and remains irreversibly open to competition. To require a metric for use in evaluating the state of BellSouth's performance for CLECs today and to drop that metric in on-going assessments (to gauge/prevent backsliding) would certainly not benefit continuing competition in Kentucky.

Moreover, in order for the FCC to make an accurate determination as to whether BellSouth has satisfied all prerequisites to obtaining 271 approval, the FCC must conduct an evaluation based upon the performance standards that this Commission adopts to govern BellSouth's performance. Kentucky-specific performance standards and Kentucky-specific data are necessary to make a § 271 determination. The data BellSouth has provided is not sufficient for this Commission to make a determination regarding BellSouth's request for § 271 relief.

Any determination made without data that is consistent with the performance standards this Commission may order would be improper because it is this Commission's standards, not those of another Commission, by which BellSouth's performance should be judged now and going forward. Consequently, in order for the Commission to make a determination on BellSouth's performance, such determination must be made based upon performance standards adopted by this Commission.

BellSouth has told this Commission that it intends to use the SQM “ordered by the Georgia Commission” to define the data that will be produced in BellSouth’s performance reports for Kentucky. (Varner Direct at 3 - 4) What it proposes to file in this regard, however, does not comport with the order from the Georgia Commission. BellSouth has not appropriately implemented the Georgia Commission’s Order and BellSouth’s Interim SQM is not completely reflective of the Georgia Order. As discussed in greater detail below, a review of the measures in BellSouth’s Interim SQM reveals that BellSouth, without notice to CLECs or the approval of the Georgia Commission, has modified what it measures and what it reports. The measures BellSouth is reporting do not yet even reflect what the Georgia Commission ordered. BellSouth has unilaterally decided what performance it will report to the Commission.

As a result of unauthorized modifications to measures, and BellSouth’s failure to provide reports, BellSouth has not complied with the Georgia Commission’s January 12 Order for numerous pre-ordering, ordering, provisioning and maintenance measures. The modifications BellSouth has unilaterally implemented are important because they may allow BellSouth to hide performance deficiencies from the Kentucky Commission. The Georgia Commission’s January 12 Order adopted several measures from BellSouth’s May 2000 SQM. (See Jan. 12 Order at 3-6.) A review of the most recent BellSouth SQM filed with the Georgia Commission reveals that BellSouth has changed some of those measures. (Bursh Rebuttal at 9-10)

One key area in which BellSouth has modified the May 2000 SQM measures is that it now excludes certain data from the measures calculations. Reported performance measures data must present an accurate picture of BellSouth’s performance. (*Id.* at 10)

When data is excluded from measures, or when particular events are not monitored at all, the measures do not reflect BellSouth's true performance and do not allow for adequate evaluation of BellSouth's performance. The excluded data will not be available to CLECs or the Georgia Commission and will not be available to the Kentucky Commission. BellSouth unilaterally decided to exclude certain data. BellSouth should not be allowed to exclude data without prior Commission approval. Moreover, any excluded data should be tracked and monitored to ensure that performance deficiencies reflected in the excluded data are not hidden from the Commission. (*Id.* at 10-11)

At the hearing, in response to questions from Ms Daugherty, Mr. Varner testified that BellSouth has not excluded anything ordered by the Georgia Commission from its SQM. (Tr. V. 2 at 72) Mr. Varner asserts in his rebuttal testimony that BellSouth only made wording changes to clarify the SQM describing the measurements. (Varner Rebuttal at 86) Mr. Varner, however, never denies that BellSouth has changed the language of the measures that the Georgia Commission ordered. He merely offers BellSouth's unsupported assertions regarding why the changes were made without the approval of the Georgia Commission.

For example, Mr. Varner alleges that directory listings should be excluded from the % Missed Installation Appointments and Average Completion Interval because BellSouth sends all directory listings to BAPCO, a BellSouth affiliate, for processing whether they are CLEC or BellSouth retail directory changes. (*Id.* at 87) However, as Ms. Bursh explained in her surrebuttal testimony, BellSouth ultimately controls the timing of changes because BAPCO cannot initiate processing of directory listing transactions until they are received from BellSouth. (Bursh Surrebuttal at 7) Therefore,

if BellSouth delays in sending CLEC transactions to BAPCO, CLEC customers may not be listed in the directory at the committed timeframe. (*Id.*) Consequently, BellSouth's rationale for excluding directory listings from the measure is without merit.

With regard to BellSouth's unilateral decision to include only the original missed appointment in the Missed Appointment measure, Mr. Varner's explanation is that BellSouth has always only measured the first appointment. (Varner Rebuttal at 87) Mr. Varner contends that it was not a coding change, but merely a further wording clarification to the SQM. (*Id.*) Mr. Varner's explanation for BellSouth's other changes in exclusions "are based on just good old common sense." (*Id.* at 89)

As explained by Ms. Bursh, however, the Georgia Commission's January 12 Order' expressly specified the measures and the language describing the measures that BellSouth was to implement. Indeed, the Georgia Commission's Order referenced language from BellSouth's May 2000 SQM and from the additional measures the CLECs proposed that the Georgia Commission adopted. BellSouth has unilaterally changed this language in its Interim SQM. As explained in Ms. Bursh's rebuttal testimony, BellSouth's "wording changes" alter what is actually being measured. (Bursh Surrebuttal at 8)

Perhaps the most significant exclusion is BellSouth's decision to exclude non-business hours from the interval calculation for partially mechanized local service requests ("LSRs") for both the Firm Order Confirmation ("FOC") Timeliness measure and the Reject Interval measure. (Bursh Rebuttal at 15) These are critical measures for CLECs. Indeed, the FCC, in considering § 271 applications, recognizes that timely return of order confirmation notices "is a key consideration for assessing whether

competitors are allowed a meaningful opportunity to compete.” (Memorandum Opinion and Order, *In the Matter of Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc. (d/b/a Southwestern Bell Long Distance) for Provision of InterLATA Services in Kansas and Oklahoma*, FCC 01-29 CC Docket No. 00-217 ¶ 137 (rel. January 22, 2001) (“*SWBT Kansas Oklahoma Order*”).) (*Id.* at 15-16)

In Georgia, BellSouth showed an improvement in FOC timeliness, but not because BellSouth’s actual performance improved. BellSouth just changed the way it calculates the measure by excluding non-business hours from the calculation. Under the Georgia Commission’s order, a partially mechanized LSR submitted on Monday at 1:00 p.m. should result in the CLEC receiving a FOC no later than 7:00 a.m. the next morning. With BellSouth’s unauthorized exclusion, BellSouth would still be compliant if it returned the FOC by 11:00 a.m. on Wednesday, almost one and a half days later. Thus, BellSouth may appear to have improved its FOC timeliness, but not because it has improved its process. BellSouth’s unilateral modification has changed the intent of the Georgia Commission’s benchmark. (*Id.* at 16) Consequently, BellSouth’s performance in this critical area is distorted and likely masks discriminatory performance by BellSouth.

Performance reporting that is not based on the entire set of data is inaccurate and is not useful to this Commission in monitoring BellSouth’s performance. Because they are not reported, inappropriate exclusions have the potential to mask true performance and to hide deficient performance. Exclusions are particularly troubling when the monitored party, in this instance BellSouth, unilaterally decides what the regulator will see. (*Id.* at 14)

BellSouth has not refuted Ms. Bursh's contentions regarding BellSouth's unilateral modifications to the Georgia Commission's Order. BellSouth merely offers flimsy explanations for the changes it made. The bottom line remains that BellSouth has made changes in its Interim SQM that were not ordered by the Georgia Commission. (Tr. V.2 at 76-77) Accordingly, this Commission should reject BellSouth's request for § 271 relief until it has had the opportunity to fully consider and address the concerns of all parties, CLECs and BellSouth, regarding performance measures, standards, and remedies. The Commission should not consider BellSouth's request until BellSouth has implemented the SQM and remedy plan ordered by this Commission and produced at least 3 months of associated data under that plan.

ISSUES AND ARGUMENTS

ISSUE: APPROPRIATE SERVICE QUALITY MEASURES TO BE REPORTED BY BELL SOUTH

It is important that performance measurements capture all key aspects of ILEC service. The major measurement categories, for the most part, are the major categories of OSS: preordering, ordering, provisioning, maintenance and repair, and billing. In addition, the following categories of measurement should be included: operator service and directory assistance ("OS/DA"), database information, E911, trunk group performance, collocation, and change management.

A performance measurement plan has to be comprehensive because significant gaps in coverage make it practically impossible to detect and deter below-parity performance. If an area of BellSouth's performance is not covered by a metric, the primary tool available to remedy poor performance is an action to enforce the party's interconnection agreement. Enforcement actions based upon disparate treatment are uphill battles because the CLEC has to prove that BellSouth is providing better service to

itself, its customers or its affiliates than to the CLEC. To prove its case, the CLEC must obtain accurate internal BellSouth information concerning the services it provides to itself, its customers or its affiliates. Even if this can be done, an enforcement case takes far too long for a CLEC attempting to solve an immediate problem affecting its business. Thus, comprehensive performance metrics go hand-in-hand with the potential for broad scale entry into the local market. (Kinard Direct at 9.)

The Commission should reject out of hand the “permanent” SQM that BellSouth has proposed for use moving forward in Kentucky in Varner Direct Exhibit AJV-2. This proposal offers even less protection to CLECs than the “interim” (Georgia) SQM provides. (Kinard Direct at 5.) A number of these detrimental omissions are discussed by Ms. Kinard in her Direct Testimony at page 14 – 17.

Measurements should cover all problems that can and have arisen through real market experience with:

- (A) Service delivery methods such as resale and individual unbundled network elements (“UNEs”) (such as loops or transport); UNE combinations (such as enhanced extended loops and platform); and facilities interconnection.
- (B) Products and processes such as coordinated conversions, various “flavors” of xDSL and line sharing and splitting services, local number portability, loop acceptance testing and loop conditioning.
- (C) Retail-wholesale relationships management such as OSS speed and connectivity, help desk responsiveness, database update accuracy and timeliness, and change management processes and software error correction timeliness.
- (D) Provisioning status notices such as acknowledgements, confirmations, rejections, completion notices, jeopardy notices and loss notices.

- (E) Maintenance responsiveness and capability in resolving customer trouble reports.
- (F) Billing accuracy and completeness for the end user customer and the CLEC.

(Kinard Direct at 10 – 11.) In addition to improved OSS functionality, enhanced performance measurements, standards and remedies will be critical in enabling CLECs to enter the Kentucky local market. Many of the metric revisions and new metrics (particularly those involving change management, confirmation and rejection completeness, software validation and error correction, and timely completion notices) are geared toward ensuring that CLECs' market entry does not encounter many of the same impediments encountered elsewhere. These impediments have slowed CLECs' growth, particularly in the residential market. They also have harmed customers with double billing and sometimes even local service termination when ILECs erroneously concluded that a customer was not paying its bills, when in fact the customer had switched to a CLEC and was paying the CLEC's bills. (*Id.* at 6 – 7.)

On January 16, 2001 the Georgia Public Service Commission issued a final order in its performance measurement docket. (See *In re: Performance Measures for Telecommunications Interconnection, Unbundling and Resale*, Order, Docket No. 7892-U.) This order added seventeen metrics to BellSouth's then-filed plan.² BellSouth's

² Response Time for Manual Loop Make-Up (LMU) Queries; Response Time for Electronic LMU Queries; Acknowledgement Timeliness; Acknowledgement Completeness; FOC/Reject Response Completeness; % Completions/Attempts w/o Notice or < 24 hours notice; Average Recovery Time for Coordinated Cuts; Cooperative Acceptance Testing Attempts vs. Requested by CLECs; Recurring Charge Completeness; Non-recurring Charge Completeness; Mean Time to Notify CLECS of Network Outages; Mean Time to Notify CLECS of Interface Outages; Average Database Update Interval; Percent Database Update Accuracy; NXX and LRNs loaded and tested by LERG date; Bona Fide Requests ("BFRs") processed in 30 business days; BFR Quotes provided in X days.

proposal in Kentucky includes many of additional metrics, though others – such as Percent Completions/Attempts without Notice or < 24 hours notice; BFRs processed in 30 business days; and BFR Quotes provided in X days have been deleted from their Kentucky proposal. (Kinard Direct at 16 - 17.)

The Florida Public Service Commission has also recently approved service quality measures to be reported by BellSouth. (*In re: Investigation into the establishment of operations support systems permanent performance measures for incumbent local exchange telecommunications companies*, Florida Docket No. 000121-TP, Order No. PSC-01-1819-FOF-TP, Issued September 10, 2001 (“*Florida Order*.”)) All of the metrics proposed by BellSouth in that proceeding were adopted as part of the Florida SQM. In addition, the following four metrics proposed by the CLECs (termed “ALECs” in Florida) were added to the Florida SQMs: “Percent Order Accuracy”; “Percent Completion/Attempts without a Notice or with less than 24 Hours Notice”; “Percent Completion of Timely Loop Modification”; and “Percent Billing Errors Corrected in x Days”. (*Id.* at 17.) The Florida Commission also clarified the metric “Percent Successful xDSL Service Testing,” (*id.* at 13), and called for further consideration of the metric “Percent of Orders Cancelled or Supplemented at the Request of the ILEC” during the Commission’s six month review.

It also should be noted that in the Georgia proceeding, BellSouth had reported that it was then in the process of developing the following five measurements:

- Service Inquiry with Firm Order (Manual)
- Loop Makeup Inquiry (Manual and Electronic)
- Timeliness of Change Management Notices
- Percentage Functional Acknowledgements Returned on Time
- Percentage Troubles within 7 Days of Hot Cut.

The CLECs' testimony focuses on the following additional metrics, discussed below.

Ordering Measures:

Mean Time to Provide Response to Request for BellSouth-to-CLEC Trunks
Percent Responses to Requests for BellSouth-to-CLEC Trunks Provided within 7 Days
Percent Negative Responses to Requests for BellSouth-to-CLEC Trunks

These measures deal with BellSouth having sufficient trunk capacity from the BellSouth network to the CLEC switch when the CLEC's traffic is increased substantially. A CLEC cannot expand without adequate trunk capacity inbound from the ILEC as well as outbound to the ILEC. (Kinard Direct at 19 - 20.) ILEC delays in providing reciprocal trunks or delays in providing CLECs a due date for such trunks forces CLECs to delay installing new customers. ILEC delays on trunk resizing prevent CLECs from increasing market share. (*Id.* at 19.)

BellSouth summarily dismisses these measures, suggesting that these issues are better resolved through accurate CLEC forecasts of traffic requirements. (Varner Rebuttal at 125.)

BellSouth's response is unrealistic and, at best, not pro-competitive. Accurate forecasting by the CLEC will not prevent BellSouth from rejecting CLECs' requests for augments. BellSouth adheres to an outmoded policy that trunk augmentation of a final trunk group should begin when utilization reaches 75-85%. (Kinard Direct at 19 - 20.) CLECs' growth is more dynamic than BellSouth's and a 50% fill can quickly move to blocking levels with the addition of one large customer. (*Id.*) The problem is not that CLECs need to improve traffic forecasts; rather, it is that BellSouth's ability to severely hinder CLEC market growth through slow provisioning of inbound trunks, including the sending of the initial request for

such BellSouth-to-CLEC trunks, requires an enforcement mechanism. The measures proposed by the CLECs would capture BellSouth's performance and motivate improvement. States outside of the BellSouth region (New York, Pennsylvania and New Jersey) include a measurement for the time it takes to respond to CLECs' requests for Verizon-to-CLEC trunks.

Provisioning Measures:

Percent of Hot Cuts Not Working as Initially Provisioned

This metric captures when loops are provisioned on time but are not working. Often CLECs cannot log a trouble report until the order is completed in the ILEC's billing system, which may take hours or days. Consequently, these provisioning troubles are undetectable by BellSouth's current performance measures. (Kinard Direct at 20.) This metric is necessary to track how BellSouth performs its coordinated cutovers. Without it, it will appear that all loops BellSouth provisions on time are working when in fact, they may not be.

BellSouth claims that this metric is not needed because it is addressed in its proposed Metric P-6C Percent Installation Troubles within 7 Days. (Varner Rebuttal at 126.) Yet that metric only captures those troubles that occur after the order has been completed. It does not show whether the order was completed correctly and in working condition, as does the CLEC-proposed metric.

Mean Time to Restore a Customer to the ILEC
Percent of Customers Restored to the ILEC

These metrics measure the speed of restoring service to BellSouth when a customer conversion fails and the percent of accurate port-backs to BellSouth when necessary. (Kinard Direct at 20.) These metrics are necessary to provide an accurate picture of the

magnitude of customers affected that had to be restored to the ILEC as well as how long it took.

Call Abandonment Rate – Ordering and Provisioning

Call Abandonment Rate –Maintenance

These measures monitor BellSouth's handling of support calls from CLECs, when CLECs experience operational problems dealing with ILEC processes or interfaces. (Kinard KK-C at p. 3.) Prompt responses from the ILEC ordering and provisioning support centers are needed to ensure that the CLEC customers are not adversely affected, because any delay will adversely affect CLEC retail customers who may be holding on-line with the CLEC customer service agent. (*Id.*) BellSouth's O-12, Speed of Answer in Ordering Center, does not capture the full abandonment time. It is important to capture how long CLECs are on hold, including the time when calls are abandoned, to provide a true picture of when customers or CLECs may get frustrated with the hold times.

Percent Successful xDSL Service Testing

BellSouth should measure the percent of successful xDSL cooperative testing. Similar to the existing BellSouth metric for coordinated cuts, this metric would determine how often an xDSL loop that is not working is delivered to the CLEC. (Kinard Direct at 21 – 22.) Joint Acceptance Testing generally decreases costs for both the ILEC and for the CLEC, because problems are identified during the provisioning phase, rather than arising as troubles in the repair and maintenance phase. Furthermore, Joint Acceptance Testing is important to competitors as a customer service issue. Customers who are forced to take days off from work to wait for their DSL loops to be delivered are generally unhappy when the loops delivered are not working. Covad has testified in

Florida and North Carolina that this has been a serious issue in maintaining customer satisfaction for data providers operating in BellSouth's regions.

The delivery of xDSL loops is comprised of two separate and equal components: whether the loop was delivered on time and whether it was working when delivered. CLECs need to have cooperative testing done on xDSL loops to determine if BellSouth has done all the appropriate work to provide connectivity. To test these two components of xDSL loop delivery, this proposed measurement assesses whether BellSouth participates in joint testing and whether BellSouth's loops pass that joint acceptance testing on time. Participation in testing is important, but the real question is how many of the loops pass the joint tests conducted between a CLEC and BellSouth. The proposed CLEC measure makes it clear that BellSouth must both test the loop and pass the test to receive a successful report on that metric. (Kinard Direct at 21 – 22.)

BellSouth has a measure, Cooperative Acceptance Testing-Percent of xDSL Loops Tested (P-8). BellSouth's position is that *intends* P-8 to test whether the loop passed cooperative testing. This metric, however, measures only successful tests, rather than measuring all tests conducted. (See Varner Direct Exhibit AJV-1 at p. 3-28.) Thus, BellSouth has omitted a measure of whether the cooperative tests conducted show the loop to be working properly. Like coordinated hot cuts, this also should be part of the end time measurement for Average Completion Interval (P-4) and Missed Appointment (P-3) metrics for xDSL loops, but it is not in BellSouth's proposal. In New York, Verizon measures for both CLECs that use and do not use an acceptance process as part of its Missed Appointment metrics for xDSL service. (Kinard Direct at 21.)

Moreover, in the SEEM Disaggregation - Analog/Benchmark section, BellSouth proposes that it pay Tier II penalties if it fails to meet the benchmark of 95% of Lines Tested. Thus BellSouth will test the lines, but makes no commitment to *pass* the tests or to record the installation as a failure. (See Varner Direct Exhibit AJV-1 at p. 3-28.)

In Florida, BellSouth agreed to modify its proposed metric to address CLEC concerns about deficiency in the information it would otherwise provide:

At the hearing, whether BellSouth's current metric was measuring only successful tests or measuring all tests conducted was debated. BellSouth witness Coon clarified that this measure was in fact the same as the measure the ALECs were requesting. BellSouth stated that it would be willing to make adjustments to its proposed SQMs to ensure that it was clear that the loop had to be successful from both the ALEC and the ILEC points of view. We find such clarification necessary. Accordingly, the following changes shall be made: (1) In the Definition Portion, the following sentence shall be added "A loop will be considered successfully cooperatively tested when both the ALEC and ILEC representatives agree that the loop has passed the cooperative testing"; and (2) In the SEEM Analog/Benchmark, the phrase "95 percent of Lines Tested" shall be replaced with "95 percent of Lines Tested Successfully Passing Cooperative Testing." (*Florida Order* at 13.)

Such clarification of BellSouth's proposed metric should be made in Kentucky as well or the CLEC proposed metric adopted.

Percent Completions/Attempts without Notice or with Less Than 24 Hours Notice

This metric relates to the situation in which a CLEC does not receive a confirmation on a due date or receives it only 24 hours in advance. (Kinard KK-C at p. 4.) This metric is part of the Georgia metrics and part of what BellSouth is proposing in its "interim" Kentucky plan. It is notably missing, however, from BellSouth's proposed permanent SQM proposal for Kentucky. Contrary to BellSouth's assertions, this issue is not captured in any other metric. (Kinard Direct at 17.)

Late confirmations from BellSouth force CLECs to scramble at the last minute to try to meet the looming due date, if it can be met at all. Customers and CLECs may be unable to schedule necessary vendors to complete the installation, resulting in customer frustration with the CLEC. The CLECs propose this measure so that □customer not ready□ situations due to late/no notice from BellSouth can be highlighted, and BellSouth's performance can be monitored and corrected. (*Id.*)

BellSouth suggests that this measure is unnecessary because the same information can somehow be obtained by combining several of its provisioning measurements (Varner Rebuttal at 133; Tr. Vol. 1 at 120 – 121.) None of the metrics noted by BellSouth – not specified but presumably “Firm Order Confirmation Interval, Order Completion Interval, Total Service Order Cycle Time, and Percent Missed Installation Appointments,” -- cover the situation where a CLEC fails to receive a FOC. Even in those instances where a FOC is received, the data in BellSouth's proposed metrics will not reveal whether a FOC was delivered 24 hours before the due date. Both Georgia and Florida have required implementation of this metric. (*See Florida Order* at 14 – 15.)

Percent Completion of Timely Loop Modification/Conditioning on xDSL loops

Incumbent local exchange carriers such as BellSouth regularly perform maintenance and provisioning on their outside plant facilities, including placing and removing certain devices from those loops, such as load coils and excessive bridged tap. As the Commission is aware, some loops require modification or conditioning before they can be used to provide a customer with xDSL service. This metric measures BellSouth's timeliness in making the needed modifications or performing the necessary de-conditioning. (Kinard Direct at 22.) Because xDSL is a growing area of service for CLECs and BellSouth, it is

important that BellSouth modify and condition loops in a timely manner. (*Id.*) The CLECs propose that this separate metric measure BellSouth performance in this area, because none of the existing SQM metrics captures the appropriate information.

This metric is particularly important to data CLECs. From a parity perspective, it is important to note that many BellSouth retail services also require conditioned loops, including DS-1 and ISDN circuits. For its retail customers, BellSouth has a single delivery interval, irrespective of whether the loops require conditioning or not. A BellSouth DS-1 customer is not told that 7 days will be added to his order because BellSouth must perform some routine maintenance on his loop. But that is exactly what BellSouth proposes for CLECs in Kentucky. Because of this inherent inequity, the Commission should shorten the interval allowed for delivering a conditioned loop to 95% within 5 business days. (Kinard Direct Exhibit KK-C at 10.)

BellSouth has argued that that loop conditioning is included within its Order Completion Interval measurement (P-4). (Varner Rebuttal at 129.) Yet that metric measures the time from the issuance of a firm order confirmation (FOC) with a delivery date to the time when the order is closed, indicating that the loop has been provisioned. (Varner Direct Exhibit AJV-1 at p. 3-10.) Because loop modification/conditioning is performed during the “service inquiry processes,” before the FOC is delivered to the CLEC, it is not captured in this metric. Thus, the BellSouth measurement P-4 does not measure the process BellSouth actually has in place for loop conditioning, though it will supposedly measure the process BellSouth claims it will use in the future.

The CLEC measure on this issue is critical to the CLECs in Kentucky, particularly data providers. This CLEC-proposed metric with a benchmark of five days

in which that conditioning should be performed provides three important benefits for DSL providers in Kentucky. First, it gives a firm benchmark in which DSL providers can tell customers their loop will be conditioned and delivered. Second, it enables DSL providers to measure whether BellSouth is meeting this commitment. Third, it gives this Commission an opportunity to review BellSouth's performance for competitors in routine maintenance tasks that are performed every day for BellSouth's own facilities and for BellSouth's own retail customers. Loop conditioning should be one of the areas in which the Commission can most accurately assess whether BellSouth's treatment of competitors is non-discriminatory since the exact same work is routinely conducted in BellSouth's outside plant for its own retail services.

Thus Florida Commission stated:

We agree that BellSouth has adequate disaggregation in the Order Completion Interval metric to address the ALEC concerns. However, the Missed Installation Appointments Interval does not contain this same level of disaggregation for orders with and without conditioning. We find this disaggregation useful. As an alternative to the disaggregation for loop conditioning for Percent Missed Installation Appointments, BellSouth shall establish a separate measurement for loop conditioning. (*Florida Order* at 15.)

The Commission should require the same in Kentucky.

Billing Measures:

Percent Billing Errors Correct in X Days

Percent Billing Errors Corrected in X Days would assess whether errors in BellSouth's daily usage file and carrier bills are corrected within a reasonable time. BellSouth delays in providing adjustments to carrier bills or correct daily usage feed errors can harm the CLEC and its customer in several ways. Errors that do not get

corrected promptly in the daily usage file lead to CLECs either holding up charges or passing on incorrect charges on to the customer. (Kinard Direct at 22.) The CLEC must then expend its resources to later adjust customer invoices. BellSouth concedes that its invoice accuracy measure does not capture whether errors are corrected within a reasonable time. (Tr. Vol. I at 134 - 135.) Without this metric, there is no way to ensure that when CLECs ask for an adjustment because of errors in the bill, it is done in a timely manner.

The Florida Commission has recently ordered implementation of this metric, finding:

... this proposed metric would capture how quickly BellSouth corrects errors. While there are existing measures to capture billing timeliness and billing accuracy, none of the measures capture how quickly errors are fixed. We agree that this metric shall be added. (*Florida Order* at p. 17.)

The Commission should require the implementation of this metric as well.

Other Additional Measures:

Percent Response Commitments Met On Time

Even more important than how quickly BellSouth representatives answer the phone is how quickly they answer questions or resolve problems. CLECs should not have to wait days for BellSouth to respond to a problem that has stalled production of orders for the CLEC. The metric would measure the timeliness of BellSouth representatives in answering questions or resolving problems asked by CLECs. (Kinard Direct at 22 - 23.)

BellSouth disagrees with the need for this metric and believes this issue would be better addressed through individual, contract negotiations rather than developing a group

of measures for all CLECs. (Varner Rebuttal at 130 - 131.) The CLECs could not disagree with this approach more. The purpose of this proceeding is to establish comprehensive metrics to evaluate BellSouth's performance. Responsiveness of BellSouth representatives to CLEC inquiries about items such as missing notifiers is crucial to CLECs. (Kinard Direct at 22.) Verizon's problems in this area led to the introduction of a three-day standard for resolving such requests in the New York metrics.

Percent ILEC vs. CLEC Changes Made

BellSouth has included metrics covering the timeliness of Change Management Notices and Documentation in its proposed SQM. As Exhibits KK-A and B to Ms. Kinard's direct testimony explain, there are many deficiencies with the proposed SQM. Most significantly, BellSouth has not yet included a metric that tracks whether it responds fairly to CLEC requests for changes and new functionalities on its interfaces. (Kinard Direct at 23.) While CLECs prioritize the change requests, BellSouth implements these changes whenever it chooses (if ever), and it ignores the prioritization. (Kinard Direct at 23 - 24.) CLECs have noted problems in getting their change requests included on BellSouth's implementation schedule for software changes.

BellSouth is extremely critical of this proposed metric, alleging that the CLECs' request for a metric that evaluates the efficacy of the Change Management Process would produce "no useful information." (Varner Rebuttal at 131.) The CLECs not only believe that a metric can be crafted that measures whether BellSouth responds fairly to CLEC requests for changes and for new functionalities, but that such a metric is necessary for the continued development of local competition. BellSouth states that the purpose of change management is not so much to implement prioritized CLEC change requests but

to “work together as a team . . . for the good of all participants.” (Varner Rebuttal at 132.) The CLECs agree that an important purpose of the change control process is for the entire industry to work together to prioritize changes to BellSouth’s OSS. The process does not work this way today, however. Though Mr. Varner could not confirm or deny this, CLEC witnesses such as Sherry Lichtenberg will testify in the second phase of this docket that change requests prioritized as **the top priorities** by the consensus of CLECs participating in the Change Management Process languish for, literally, **years**.

Recent exceptions in the Florida OSS Test confirm that the process appears to be biased against CLECs. (See Florida Exceptions 88 and 105.) While CLECs are able to prioritize their change requests, the process does not mean that such requests will make it into an upcoming release as quickly as BellSouth’s priority changes. CLECs do not even know what BellSouth’s priority changes are to compare with CLECs’ own change requests.

Implementation of the CLECs’ proposed metric will track how often CLEC changes are made. CLECs will be proposing a new version of this metric in the Georgia six-month review of metrics later this month. If the Commission agrees that this metric would be valuable to include in its performance plan, it should either adopt the CLEC proposed metric or wait to consider any such metric(s) adopted in Georgia shortly after adoption in that state. A more fleshed out metric may be developed in the Georgia six-month review workshop.

Percent Software Certification Failures

CLECs must know that existing systems still will be able to function when BellSouth introduces software upgrades. (Kinard Direct at 25.) This measurement

provides some assurance that BellSouth will sufficiently test before a system is rolled out. Knowing that software upgrades will not negatively impact CLEC systems will eliminate potentially costly delays to CLECs and BellSouth. (*Id.*)

Software Problem Resolution Timeliness
Software Problem Resolution Average Delay Days

These metrics examine how quickly BellSouth corrects software errors caused by changes to an existing interface, establishment of a new query type or other changes. (Kinard Direct at 25.) BellSouth claims that this measure is unnecessary because the testing arrangements made available with any software update are adequate to resolve these issues before the software is loaded and that the change management process will eliminate the need for this measure. (Varner Rebuttal at 132.) The change management process, however, cannot prevent failures or problems prior to implementing a software program or software change and there is no assurance that BellSouth will follow such processes. The only way to prove BellSouth's theory is to test it -- metrics will show whether systems are tested and problems resolved quickly. The Georgia Commission has required BellSouth to add a Software Error Correction timeliness metric and the New York and Texas plans also include such a metric.

Bona Fide Requests processed in 30 Business Days
BFR Quotes Provided in X Days

BellSouth proposes that these metrics be included in its "interim" Kentucky plan but that these metrics be eliminated from a permanent plan in Kentucky. (Varner Direct at 56 – 57.) BellSouth argues this measurement should be deleted because the small number of transactions does not enable one to draw any conclusions about BellSouth's performance. (*Id.*) Whether order volumes are high for BFRs or not, CLECs consider

this an important metric. (Kinard Direct at 17.) Low volumes may, in fact, be due to CLEC frustration with lack of responsiveness or the lengthy process imposed by BellSouth for BFRs. The permutation statistical test can be used on sample sizes as small as one (1) to determine whether parity exists. The CLECs would not be opposed to a quarterly reporting of this metric until volumes increase. The Texas Public Utility Commission in its last six-month-review, agreed with its staff's denial of Southwestern Bell Telephone Co.'s request to eliminate similar BFRs citing the metric's importance even while monitoring small sample sizes.

ISSUE: APPROPRIATE BUSINESS RULES, EXCLUSIONS, CALCULATIONS, LEVELS OF DISAGGREGATION AND PERFORMANCE STANDARDS FOR EACH METRIC

In addition to establishing the right metrics, setting the right business rules and standards is critical to developing a good performance plan. To properly assess the service BellSouth provides CLECs compared to that it provides its retail customers and affiliates, the metrics must be documented in detail such that it is clear what will be measured, how long it will be measured and in what situations a particular event may be excluded from monitoring. Sufficient disaggregation of measurement results is also needed to allow "apples to apples" comparisons in that only results for similar operational conditions will be compared and the results will not mask discrimination. Also imperative to a successful plan are pre-specified, pro-competitive performance standards for retail analogs and establishment of benchmarks where no retail analog exists.

Several of BellSouth's Measures Are Inadequately Defined.

Each measurement begins with a definition which briefly describes what the measurement is designed to measure. Business rules are the heart of each measure, stating the start and stop time of each metric and providing details necessary to describe the processes in between. The business rules need to be structured to ensure that BellSouth discrimination is not being masked. (Kinard Direct at 6, 11 – 12.) Misleading results can flow from poorly defined metrics. A simple example is where a metric provides an interval of “thirty days,” but BellSouth may calculate the metric based on thirty *business* days, regardless of whether the original intent was thirty calendar days, if not specified just that way in the explanation of the metric. This provides BellSouth (significantly) more time to meet the metric than was originally contemplated, resulting in an appearance of better performance than that which is actually provided. Sometimes there are legitimate reasons to provide exclusions to the defined business rules. These should be easy to understand. Appropriately defined business rules, exclusions and calculations are essential to a good performance measurements plan.

Proper definitions, business rules and exclusions are fundamental. For example, BellSouth has proposed two similar measures, CM-5, Notification of CLEC Interface Outage, and M&R-7, Mean Time to Notify CLEC of Network Outages. (Varner Direct Exhibit AJV-1 at pp. 11-9, 4-13.) The problem with these metrics as proposed is that the time it takes BellSouth to verify such an outage is not included in the metrics themselves. (See Kinard Direct KK-B at 3, 4.) Indeed, none of BellSouth's measures captures the amount of time it takes BellSouth to verify either of those types of outages.

The lack of adequate business rules and definitions undermines the intent of any metric. For example, though in Direct Testimony BellSouth disagreed with the need for a Service Order Accuracy metric (Varner Direct at 57), it appears to now agree with the implementation of such a metric. (Tr. Vol. 1 at 124 – 126.) The CLECs have long insisted on a Service Order Accuracy metric to be able to evaluate the accuracy of BellSouth representatives when they enter orders for CLECs for non-mechanized and partially mechanized orders. Unfortunately, details are scanty about how BellSouth's metric will measure the accuracy of orders. Indeed, it is not clear that BellSouth knows exactly what it is proposing with this metric.

Mr. Varner testified that BellSouth intends to measure service accuracy on a regional basis, using information derived from just three states (which he stated were Florida, Georgia and Kentucky.) (Tr. Vol. 1 at 126 – 129.) Mr. Varner was unable to say whether the sample size would be statistically significant or even whether BellSouth's business rules regarding the metric would establish whether the metric would draw from a statistically significant sample. (*Id.* at 127 – 129.) Indeed, Mr. Varner could not say how the sampling would be done, under BellSouth's proposed metric. (*Id.* at 127.)

Several weeks before the Kentucky proceeding (which took place from September 24 – 25), Tennessee held a similar hearing to determine a permanent performance measures plan for that state the week of August 20. In that proceeding most of the testimony sponsored by Mr. Varner was sponsored by another BellSouth witness, David Coon. Mr. Coon was asked questions about this metric similar to those asked of Mr. Varner yet his answers were quite different:

Q. Is it true that BellSouth only intends to provide the information on a regional basis starting with an average of three states?

- A. No. That -- that had been discussed back about two or three months ago, but our proposal now is to do it regionally with a sample from all nine states.
- Q. How would a sampling be done?
- A. I don't know.
- Q. Do you intend to provide more information on what BellSouth would propose for percent order accuracy in this docket?
- A. In this docket, no. But could you tell me what additional information you might be talking about?
- Q. Well, how that metric is going to be developed.
- A. If the Authority should order this particular metric, we could certainly provide more information or more detail about how it would be developed.

(Tennessee Docket No. 01-00193, Tr. Vol. I-D at 286 – 287.) These vague and contradictory explanations do not permit the Commission or the CLECs to know what will be measured or how or whether the metric is of any value at all as proposed.

Another example demonstrates how exclusions must be carefully scrutinized. BellSouth has proposed a 10-hour benchmark for O-8, Reject Interval for Partially Mechanized Orders (down from their originally proposed 24 hours -- see Tr. Vol. 1 at 85 - 86), but after-hours time is specifically excluded. (Varner Direct Exhibit AJV - 1 at pp. 2-19 – 2-21.) A 10-hour benchmark with an after-hours exclusion is far too long. Rejections for partially mechanized orders should be received in five hours.

A number of BellSouth's business rules are different from (and inferior to) those of other RBOCs that have received 271 approval from the FCC. For example, BellSouth's Order Completion Interval (P-4) is measured from the receipt of the FOC rather than from receipt of an error-free order. This flawed business rule is at odds with how Verizon and SBC measure order completion intervals, and, indeed, is something that the FCC objected to it in denying BellSouth's South Carolina and Louisiana 271

petitions. The FCC did not agree with BellSouth's measurement of average intervals from the start time of confirmation issuance:

We find here, as in the BellSouth South Carolina Order, that a far more meaningful measure of parity is one that measures the interval from when BellSouth first receives an order to when service is installed. From a customer's perspective, what is important is the average length of time it takes from when the customer first contacts the carrier for service to when that service is provided. This period of time is a crucial point of comparison between the incumbent's performance and the competing carrier's performance. Therefore, the most meaningful data would measure the interval from when BellSouth first receives an order to when service is actually installed, regardless of whether or not the order electronically flows through BellSouth's operational support systems. This interval can then be compared with the average time from when BellSouth's own service representatives first submit an order for service to when BellSouth completes provision of the service for its retail customers. Unlike the data BellSouth provides, which measure intervals that begin when orders are processed by SOCS, such a measure would expose any delays in the processing of orders. As we stated in the BellSouth South Carolina Order, we expect BellSouth to provide such a measure in future applications. (*In the Matter of Application by BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Louisiana*, CC Docket No. 97-231, Memorandum Opinion and Order, released February 4, 1998, ¶ 44.)

Similarly, BellSouth's hot cut timeliness metric for hot cuts (P-7A), unlike Verizon and SBC, does not determine whether the cut **ended** on time. It only measures whether the cutover started on time. Also, it only reports an average time per loop, not cut-specific information on the cutover. (Kinard Direct at 31.)

BellSouth's flow through metric (O-3) only covers orders *designed* to flow through and has benchmarks different than those designated by Verizon and SBC for Designed Flow-Through metrics. (Kinard Direct at 32.) A total flow through metric also is required, and BellSouth's proposed Achieved Flow Through benchmarks are more appropriate for total flow through. (*Id.*) The New York Performance Assurance

Plan applies a remedy if Verizon does not meet either an 80% total flow through rate or a 95% Achieved Flow-Through Rate. (*Id.*)

There are many problems with BellSouth's definitions, exclusions, business rules, and calculations. The results of the CLECs' scrutiny of BellSouth's proposed business rules, exclusions, and calculations for BellSouth's proposed measures in this proceeding are found Kinard Direct Exhibits KK-A, KK-B, KK-D and KK-F. The appropriate business rules, exclusions and calculations for the CLECs' proposed measures are described in detail in Kinard Direct Exhibits KKA, KK-B, KK-D and KK-F. For the reasons outlined above, to foster local competition, the Commission should approve the CLECs' proposal and modifications, because they are more comprehensive and meaningful than BellSouth's.

DISAGGREGATION

The CLECs propose that the Commission require BellSouth to provide a level of disaggregation such that deficiencies in BellSouth's performance can neither be masked nor ignored. Disaggregation should be required by interface type, pre-order query type, product, service order activity, volume category, trouble type, trunk design and type (for trunk blockage measurements), maintenance and repair query type and collocation category. (Kinard Direct at 26 – 29, 33 - 34.) Kinard Direct Exhibit KK-E provides in-depth details regarding the CLEC-advocated appropriate levels of disaggregation.

Disaggregation is key to obtaining an accurate snapshot of BellSouth's performance, because poor performance in particular areas can be masked when grouped into one large report. BellSouth has proposed a total of 2200 submetrics in its "interim" SQM (far fewer for its proposed permanent plan – approximately 1300). (Varner

Rebuttal at 136; Tr. Vol. 1 at 22.) The CLECs have proposed some 2800 submetrics. (Tr. Vol. 1 at 222.) BellSouth disputes that number, and claims that the CLECs are actually demanding 380,000 submetrics. (Varner Rebuttal at 138.) The difference in the parties' positions as to the total number of disaggregations sought by the CLECs appears to be based on whether, as BellSouth alleges, disaggregation as proposed by the CLECs *necessarily* involves all product types for *all* metrics, as well as all geographic areas (separated by Metropolitan Statistical Area, or "MSA") in Kentucky, or whether CLECs are, as they insist, asking for disaggregation only for certain product types for certain metrics, and for only those geographic areas in which CLECs are operating. The CLECs question BellSouth's assumption that CLECs are presently operating in all geographic areas of the Commonwealth, and base their requests for disaggregation on what is undeniably an evolving market and field of expertise in ascertaining, from the standpoint of regulatory commissions as well as the industry, the levels of disaggregation that are needed to provide useful comparisons.

Useful levels of disaggregation should cover all of the products CLECs purchase when there is large-scale entry in both the residential and business markets. Reporting should categorize the information by product type, to identify with specificity the services provided by BellSouth. Examples of product disaggregation include: resale, UNEs and trunks broken down by residential and business customer where appropriate. Further disaggregation for resale and UNEs include DSIs and DS3s, and separating BRI ISDN from PRI ISDN. Unbundled loop types, such as analog voice-grade loops, digital loops, ADSL loops, HDSL loops, unbundled copper loops ("UCLs"), and other xDSL

loops, should be disaggregated because BellSouth's performance will vary for each loop type. (Kinard Direct at 34 - 35, Kinard Direct Exhibit KK-E.)

Product Disaggregation: xDSL

The Commission should require BellSouth to disaggregate its various xDSL products, since they cover different service lengths and different provisioning processes. DS1 loops should not be included with DS3 loops because BellSouth has different intervals for DS1 and DS3 loops. (Kinard Direct at 33 - 35.) Also, line splitting should be disaggregated from line sharing in order to detect discrimination when the ILEC is not the voice provider of the loop; *i.e.*, to ensure that BellSouth is not favoring those data providers that use its voice services over those who use other voice providers. (*Id* at 34.) For line splitting or line sharing, data carriers need to ensure that they are receiving the same treatment as BellSouth's data services affiliate, so that they need to have their performance compared to that provided by the affiliate on a product by product basis. Florida has ordered the addition of line-splitting to BellSouth's product disaggregations.

Product Disaggregation: UNE-P

UNE-P is unique from other UNEs and requires specific, unique performance measures. The UNE Platform combines a loop with switching and transport and is different than merely ordering a loop without the switching and transport. (Kinard Direct at 7 - 8, 34.) In MCI's residential launch of UNE-P in Georgia, MCI's UNE-P customers have experienced an alarmingly high number of dialtone losses shortly after conversion. (*Id.* at 7.) Appropriate disaggregation permits both the Commission and the CLECs to see exactly where particular problems lie.

Provisioning/Maintenance/Repair Disaggregation:

Lumping together different kinds of problems leads to meaningless results. In contrast, disaggregation by trouble type can highlight a repetitive problem and lead to a prompt and lasting resolution. Thus, the CLECs have highlighted additional areas of concern regarding BellSouth's proposed disaggregation levels for the type of work performed. Provisioning and repair measures should be divided into three categories: 1) switched-based orders; 2) central office or "dispatch in" orders; and 3) field work or "dispatch out" orders. (Kinard Direct at 34.) For example, data for the mean time to restore service for a trouble requiring dispatch to the customer's premises should not be included in the same data set as the mean time to restore service for a trouble not requiring a dispatch.

These different types of work activities can require significantly differing amounts of time, and combining them or comparing one type of results to a different type results in misleading information about the amount of time required to perform activities for the CLEC compared to itself. Although BellSouth currently reports by dispatch and non-dispatch activity, it improperly combines dispatch in and dispatch out performance that can mask non-parity performance. BellSouth should be required to cease its current discriminatory reporting practices and report data for itself and the CLECs as follows, software changes, dispatch in, and dispatch out. (*Id.* at 39.)

Other Types of Important Disaggregation:

Different types of collocations and augments take different amounts of time to provision and should be disaggregated. For example, provisioning a cageless collocation space should require substantially less time than provisioning a caged collocation space.

Various CLECs have become concerned about the time it takes BellSouth to convert special access circuits to extended efficient links (“EELs”). The standard interval for migrations from special access to EELs should be 95% within 10 days from receipt of an error-free request for conversion. The benchmark for firm order confirmation timeliness and completion notices should be 95% in 5 hours for electronic and 24 hours for manual for each metric. (Kinard Direct at 35.) CLECs also seek measurement of how quickly BellSouth would change billing rates from special access to EELs, proposing a standard of 95% within 30 days from receipt of an error-free order. At the very least, a level of disaggregation to monitor EEL conversions should be measured in Kentucky as well. (*Id.*) Florida recently added EELs to required disaggregated reporting.

Geographic Disaggregation

The Commission should require that information be produced that is Kentucky-specific. In particular, flow through and associated ordering metrics should be provided on a state specific basis, because differences in flow through and order activity need to be viewed by regulators for each specific state, since differences can exist. BellSouth asks the Commission to accept regional data on some of the most critical measures, including Percent Flow-Through Summary (O-8) and Percent Flow-Through Detail (O-4). (Varner Direct Exhibit AJV-1 at pp. 2-5 – 2-10).

Within Kentucky, a chief dispute between the CLECs and BellSouth is whether there should be any geographic disaggregation of Kentucky data. (Tr. Vol. I at 55.) BellSouth contends there should be no geographic disaggregation and that each metric may be reported at the state or regional level. (*Id.*) CLECs propose disaggregation for some metrics at the MSA level. (Kinard Direct at 40 - 41.) BellSouth’s position is

premised on the assumption that its OSS is regional in nature and, therefore, differences on the basis of geography have no meaning. Of course, if no data are collected to show otherwise, then BellSouth's position is vindicated. The problem with BellSouth's position is that the Commission, as well as CLECs, will have no access to the relevant retail data to determine when geographical disaggregation makes a difference and when it does not. (Kinard Direct at 26 – 27.) Stated differently, if only statewide reporting is provided, CLECs that operate only in discrete areas of the state cannot compare the performance they receive to what BellSouth provides itself in those areas. Because service levels may vary from area to area, CLECs will not be able to determine whether they are receiving parity of service without geographic disaggregation.

If BellSouth could *show* that statewide reporting would not mask discrimination, then the CLECs would not require MSA-level reporting. CLECs are proposing that reporting at a MSA level be done only to the extent that CLECs are presently operating in those areas. (Tr. Vol. I at 225.) BellSouth is able to report this way, as it currently reports provisioning and repair metrics at an MSA level in Louisiana. (Tr. Vol. I at 58.) Moreover, as even BellSouth admits, disaggregation minimizes the masking of discrimination by ensuring that poor performance in one area is not obscured by being lumped together with good performance in an unrelated area. (*Id.* at 49 – 50.) The geographic disaggregation being sought by CLECs is at the MSA level because CLECs are concerned that if rural and urban, competitive and non-competitive areas of the state are combined, real disparities in performance will be hidden. (Kinard Direct at 26.) Disaggregation by MSA reveals significant geographic discriminatory treatment. If BellSouth believes that disaggregation by MSA is meaningless, it should supply the data

for some period to show that it is meaningless. (*Id.*) CLECs have proposed as a compromise that BellSouth divide MSAs of the state into three zones (very competitive, somewhat competitive and little or no competition). BellSouth may do the initial assigning of MSAs in the three regions but it would be preferable if a third party like the commission decides what zone each MSA should fall into.

In the New York Third Party OSS test, KPMG recommended disaggregation for special services for metropolitan New York City from upstate New York because KPMG's study of the data showed differences in performance between Manhattan's highly competitive market and the rest of the state.³ (Kinard Direct at 27.) POTS services already were disaggregated into five areas in New York for retail performance reporting and the same areas were adopted for wholesale POTS (resale and UNE-Platform) reporting. Such disaggregation has been vital for provisioning and maintenance metrics. (*Id.*) In addition to Verizon-New York, SBC-Texas, SBC-Ameritech, Verizon-Pennsylvania and Verizon- New Jersey all disaggregate on a geographic basis.

Performance Standards:

The first step in measuring performance is to determine if there is an analogous process that BellSouth uses or has available for use regarding its retail customers. A retail analog is a service or function that BellSouth provides for itself, its customers or its affiliates that is equivalent to a service or function that BellSouth provides to CLECs. When a BellSouth retail analog exists, BellSouth's performance for itself, its customers

⁹ "In general, the metrics may be too aggregated, especially with regard to geography. The New York City area appears to get a different level of service than other parts of the state, and CLECs have their business concentrated in this area. The result can be that BA-NY is in parity

and its affiliates should be compared to its performance for CLECs to determine if BellSouth is meeting the Act's parity requirement.

If no retail analog exists, BellSouth's performance must be gauged by a performance standard, also known as a benchmark. A benchmark is a set level of performance, such as provisioning a particular UNE 95% of the time within three days. *See Application of Ameritech Michigan to Provide In-Region, InterLATA Services in Michigan*, CC Docket 97-137, Memorandum Opinion and Order, FCC 97-137 at ¶¶ 139-41 (rel. Aug. 19, 1997). (Kinard Direct at 44.)

Benchmarks should be based on the level of performance that can be expected to offer an efficient carrier a meaningful opportunity to compete. Benchmarks cannot be based simply on BellSouth's historical performance; i.e., that BellSouth has provided a certain level of service to CLECs in the past does not mean that level of service provides CLECs a meaningful opportunity to compete or to even meet Kentucky's end user standards. (Kinard Direct at 11 - 12.)

The CLECs strongly disagrees with the benchmarks BellSouth has proposed in its SQMs that are below the 95 percent thresholds that have been set in other states, such as New York and Texas, for most metrics except for call center and OS/DA answer times. (Kinard Direct at 32 – 33.) Often, not only the percentage of timely performance, but also the intervals themselves are set below those adopted in other states. (*Id.*) As stated so aptly and succinctly by the Florida Commission, "benchmarks set below 90 or 95% do not generally allow the ALECs a meaningful opportunity to compete." (*See Florida Order* at 139.)

overall, but out of parity region by region or vice versa." KPMG Consulting's New York final

For many of its provisioning and maintenance and repair measures, BellSouth inappropriately compares UNE Loops to retail dispatch services. (Kinard Direct at 34.) Clearly physical work done in a central office should not be compared to work done in the field, including at the customer premises. If the provisioning of a UNE loop requires field work as well as central office work, then it would be classified as a dispatch out. (*Id.*) Provisioning and repair measures should be divided into three categories: 1) Switch-based orders, 2) central office or “dispatch in,” and 3) field work or “dispatch out.” These are the relevant major categories of disposition codes, in addition to those related to excluded data such as FOK/TOK/CPE, for which CLECs seek disaggregation - not 145 disposition codes, as BellSouth has misinterpreted the CLEC proposal. (*Id.*)

Some of BellSouth’s proposed standards call into question whether BellSouth is providing non-discriminatory treatment. For example, in BellSouth’s proposed P-4 metric, Average Completion Interval (OCI) & Order Completion Interval Distribution, the period BellSouth measures runs from the time the FOC is provided to the CLEC, to the time of order completion. (Varner Direct Exhibit AJV-1 at p. 3-10) For its retail orders, however, BellSouth measures the relevant period from the time an order issues in its SOCS (Service Order Control System). (*Id.*) BellSouth does not provide a FOC to its retail representatives; thus the period it measures for its retail operations is necessarily different from that measured for CLECs. (Tr. Vol. I at 107 – 110, Kinard Rebuttal at 6 - 7.)

In some instances, BellSouth has proposed “diagnostic” measures, without retail analogs or benchmarks. For some of these measures, the CLECs do not disagree, but for others, the CLECs believe the Commission should establish a benchmark. For example, BellSouth has proposed the metric O-12, “Speed of Answer in the Ordering Center,”

which measures the average time a CLEC is in queue at the LCSC, sometimes with customers on the line. (Varner Direct Exhibit AJV-1 at p. 2-33.) Because BellSouth has decided to label it “diagnostic,” there is **no performance standard** to which BellSouth is held accountable. (*Id.*) Yet there is no reason for this metric to be diagnostic: the Commission should adopt the CLECs’ proposed benchmark of 95 percent in 20 seconds and 100 percent in 30 seconds.

Likewise, the CLECs propose that a benchmark be used to measure BellSouth performance on Line Sharing and Line Splitting. Benchmarks enable CLECs to set the expectations of their customers and to manage those expectations to delivery high customer satisfaction. Without a benchmark for penalty purposes, CLECs only have BellSouth “target” intervals to rely upon, and BellSouth freely admits that it is under no compulsion to meet those targets. CLECs request that the Commission establish a three-day benchmark for provisioning Line Sharing and Line Splitting.

Several Specific Benchmark Issues

O-4 - Flow Through

Flow Through measures how many CLEC LSRs pass through BellSouth’s OSS and have a FOC returned without manual handling. (Varner Direct Exhibit AJV-1 at p. 2-8.) The ability of CLECs to place electronic orders that are processed entirely electronically with no manual intervention has a powerful impact on the CLECs’ efficiency in adding new customers and servicing existing customers. Therefore, this measure impacts competition very significantly. When orders fall out for manual processing, BellSouth service representatives must re-type the CLEC LSRs so they can be accepted by BellSouth’s legacy provisioning systems. (Tr. Vol. I at 112.) As such,

the CLECs' LSRs are subjected to longer timeframes and greater risk of human error. (*Id.*) Manually processed LSRs also are subjected to a greater risk of errors; for example, given BellSouth's internal two-order ("D" and "N") formatting, which is used to disconnect and then install new service for a single UNE-P (or loop-port combination) LSR, if the "D" and "N" orders generated by BellSouth are not linked by appropriate codes, which must be added manually by BellSouth representatives, there will be a loss of dial tone. (Kinard Direct at 8.) CLECs, including MCI in its Georgia local residential launch, are already experiencing these problems.

BellSouth proposes that for remedies purposes the flow through measure be based on the eligibility of the LSR to be processed mechanically. If the LSR is not "designed" by BellSouth to flow through, it is excluded from the measurement. BellSouth proposed the benchmarks to be 95% for Resale Residence, 90% for Resale Business, and 85% for UNE orders. (Varner Direct Exhibit AJB-1 at pp. 2-9 -- 2-10.) Yet if the LSR is designed for mechanical processing, the flow through rate should be much higher.

O-9 FOC Timeliness

The Firm Order Confirmation (FOC) response is extremely important to the CLECs, as it confirms that the order was received and is being processed and provides the date that service will be installed. The CLECs' ability to get a FOC in a timely manner is paramount. BellSouth has proposed that only 85% of partially mechanized LSRs be returned within 10 business hours (a time that was improved from 24 "business hours" by Mr. Varner on the stand). (Tr. Vol. I at 85 - 86.) If the standard is set at the BellSouth suggested levels, the end user will not be able to experience parity service. Initially, the end user would have to wait one full "business day" before finding if and

when service will be available. As a comparison, Southwestern Bell Texas is held to 95% FOC Timeliness within 5 business hours for all partially mechanized LSRs. BellSouth should be held to this same standard.

O-8 Reject Interval

The reject interval is the amount of time that transpires between the CLEC submission of an LSR and BellSouth returning the LSR to the CLEC due to errors. For June 2001, BellSouth's data show that 26% UNE orders were rejected in the region. (*See WorldCom Hearing Exhibit No. 1.*) A quick return of rejects for correction by the CLEC is critical to competition in Kentucky.

BellSouth's proposed is a reject interval of 85% of partially mechanized Rejects to be returned to the CLEC within 10 business hours. Under this proposal, BellSouth can wait one full "business day" on 85% of the orders, and even longer on the remaining 15% of the orders, before ever indicating a mistake has been made. (Tr. Vol. I at 85 – 86.) This alone will stifle meaningful competition. After correcting the mistake, the CLEC may have to wait another two days or more before learning if the problem has been corrected. All the while, the end user is left wondering when and if his or her service will be provisioned by the CLEC.

The Texas Commission reduced this problem by mandating Southwestern Bell to a standard of 97% partially mechanized Rejects returned within 6 hours. In this proceeding the CLEC Coalition's position is that that 95% partially mechanized Rejects should be returned within 5 hours, which the CLECs believe BellSouth should have no trouble meeting.

P-3 Percent Missed Installation Appointments

All parties agree that BellSouth metric on Missed Appointments is intended to capture the first missed appointment. Yet once the first installation appointment is missed, BellSouth's metric does not capture further performance on installation appointments. (Varner Direct Exhibit AJV-1 at p. 3-7.) Therefore, under BellSouth's proposed standards for this metric, if BellSouth gives a CLEC five different installation appointments and misses every one of those appointments, BellSouth only pays penalties on the first missed appointment. That means that, for example, a residential CLEC customer had to take off work 5 times to wait for BellSouth to deliver an xDSL loop. And five times that customer got frustrated and angry with the CLEC. This performance harms CLECs and needs to be captured by the metrics.

BellSouth's position is that the entire amount of time it takes to get a loop delivered would be included in Order Completion Interval (P-4). However, if a customer ultimately cancels the order, that order's history (including all missed appointments) is pulled out of the calculation for both Missed Installation Appointments and for Order Completion Interval. CLECs suggest that the following changes to this metric be made to adequately capture the CLEC experience: (1) BellSouth should report data on every missed appointment, not just the first missed appointment; and (2) Orders that are cancelled before the scheduled appointment may be excluded, but orders cancelled after the scheduled appointment NOT be excluded. This is the most rational way to evaluate whether BellSouth is providing parity service. There is no dispute that, if the order is canceled before the appointment date, the order should be excluded. The only relevant inquiry is whether BellSouth made or missed the installation appointment.

Benchmarks

The CLECs would urge the Commission to adopt 95% or higher thresholds for the additional metrics, as set forth in Kinard Exhibits KK-A, KK-B and KK-C and as has been required in New York, Texas and, now, Florida. All benchmarks should be reviewed periodically to ensure that CLECs are given a meaningful opportunity to compete as the industry progresses. (Kinard Direct at 25 - 26.)

ISSUE: AVAILABILITY OF RAW DATA

Although BellSouth provides raw data for several measures today, in other cases, such as LNP measures, it does not. Further, in other cases BellSouth provides raw data, but not in a manner that allows its meaningful use by the CLEC. For example, while BellSouth provides raw data for its hot cut timeliness measure, it does not provide the Purchase Order Number so that a CLEC can compare its own data to that reported by BellSouth to validate the accuracy of BellSouth's reports.

The Florida Commission has ordered BellSouth to post data and reports for *all approved measures* to its interconnection services web site. (*Florida Order* at 116.) The Florida Commission ruled that these reports should be posted by the thirtieth day after the month in which the reported activity occurs. (*Id.*) The raw data that supports all reports derived from PMAP should also be provided on the web site. Each report should contain the information specified in the BellSouth SQMs "Report Structure" section. BellSouth was encouraged by the Florida Commission to take action to incorporate these measures into PMAP as soon as possible. The Florida Commission indicated that this issue can be revisited during the six-month review period to determine if additional changes should be made. BellSouth was ordered to retain raw data for performance measures for a period of

18 months, and to further retain the monthly reports produced in PMAP for a period of three years. The CLECs would like Kentucky to require the same of BellSouth.

**ISSUE: THIRD PARTY AUDITS OF PERFORMANCE ASSESSMENT
PLAN DATA AND REPORTS**

The FCC's order approving Verizon's 271 application to enter the New York long-distance market noted that an important characteristic of Verizon's Amended Performance Assurance Plan was "reasonable assurances that the reported data is accurate." *In re: Application by Bell Atlantic New York for Authorization Under Section 271 of the Communication Act to Provide In-Region, InterLATA Service in New York*, CC Docket No. 99-295, Memorandum Opinion and Order ("New York 271 Order"), ¶433 (rel. Dec. 22, 1999).

Thus, audits are an integral part of a performance measurement plan designed to ensure BellSouth's compliance with the Act. BellSouth is the dominant market provider with the incentive and ability to discriminate. To ensure that BellSouth's reporting is accurate and appropriately triggers remedies designed to curb its incentive to discriminate, comprehensive annual audits are critical. (Kinard Direct at 13.) A comprehensive audit should be conducted every twelve months. A third-party auditor should be jointly selected by BellSouth and the CLECs. If the parties cannot agree on the auditor, the Commission should determine the auditor.

The audit, which is designed to ensure BellSouth is meeting its legal obligations, should be done at BellSouth's expense. (*Id.*) Other states, such as Michigan and Pennsylvania have required this of the RBOC in their states. Recently, Florida agreed with the CLECs that BellSouth should bear the audit costs, saying:

However, we support the ALECs' position that the audit costs should be borne by BellSouth. If the ALECs were to bear fifty percent of the

audit costs, the process of identifying which ALECs are to be billed and the amount to be billed to each would be difficult and burdensome. For example, for those performance measures that are only collected and reported at the regional level (nine state region), non-Florida ALECs would derive some benefit. . . . Additionally, since BellSouth controls the accuracy and validity of the performance measures, BellSouth is ultimately responsible for the outcome of the audit and, therefore, the underlying costs of the audit. Therefore, the cost of third-party audits shall be borne by BellSouth. (*Florida Order* at 183.)

The Florida Commission also found that metrics and reports should be audited at a state level, unless the data is reported and collected at a regional level and the CLECs believe the Commission should require the same. (*Florida Order* at 182.)

A thorough audit process by a neutral third party will allow the CLECs and the Commission to verify that BellSouth is providing accurate data and is appropriately incurring the consequences of the remedies plan adopted by this Commission.

ISSUE BELLSOUTH AFFILIATE DATA

Section 251(c)(2)(C) requires BellSouth to provide interconnection with its network “that is at least equal in quality to that provided by [BellSouth] to itself or to any subsidiary, affiliate, or any other party to which [BellSouth] provides interconnection.” The Act also requires BellSouth to provide nondiscriminatory access to network elements. (§251(c)(3).) The FCC has interpreted this requirement to mean that the quality of a UNE and the quality of access to the UNE that an incumbent local exchange carrier provides to a requesting carrier must be the same for all requesting carriers. (*See* 47 C.F.R. § 51.311(a). *Kinard Direct* at 36.)

The FCC has confirmed that for Section 271 purposes, for functions that it provides CLECs that are analogous to the functions it provides itself, the RBOC must

provide access that is substantially the same as the level of access the RBOC provides to itself, its customers or its affiliates. (New York 271 Order, ¶ 44. Kinard Direct at 36.)

The establishment of an affiliate that orders through the same systems and processes as the CLECs (as should be required of any BellSouth affiliate) creates a retail analog where none existed before. While the ILEC itself never received FOCs or Rejects, its affiliate may order receive the same order status notices as the CLECs. Thus, where the affiliate is ordering the same types of services as the CLECs, its activities should be separately reported to ensure that the affiliate is not being given more favorable treatment than BellSouth's competitors. (Kinard Direct at 38.).

BellSouth proposes to include the data of its affiliate "CLEC" as part of the aggregate data for all "CLECs." This practice, if implemented, would tend to improve the apparent performance for BellSouth, when such may not be the case. (Tr. Vol. 1 at 149 – 51.) As defined in the 1996 Telecommunications Act, an "affiliate" is a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. "Own" means to own an equity interest of more than 10%. The Florida Commission determined that it would monitor BellSouth ALEC affiliate performance metrics results provided each month until an assessment could be made of the data's relevance and significance. The Florida Commission determined that for the time being, no use should be made of the affiliate data for determining Tier 1 or Tier 2 compliance. (*Florida Order* at 199.)

The Michigan Public Service Commission recently required SBC Ameritech to include comparisons to affiliate performance in its remedy plan.

The Commission concludes that the comparison to service provided to Ameritech Michigan's affiliates as well as service to its own retail

customers should be part of the performance remedy plan. Section 251 of the FTA requires that Ameritech not provide inferior service to the CLECs as compared to its affiliates. It may be true that the matter could be addressed in another manner, but the Commission finds no persuasive reason for doing so. A comparison to the performance it provides its affiliates or retail customers, whichever is better, shall therefore be part of the remedy plan approved by this order.⁴ (Kinard Direct at 37.)

Earlier the Pennsylvania commission required such affiliate reporting and turned down Bell Atlantic's claim that such reporting should only be applied to CLEC-like affiliates, which it did not even have:

As noted by the ALJs, BA-PA does not have any affiliates operating under interconnection agreements; therefore, we find that BA-PA's definition actually provides for no reporting at all. This proceeding must provide this Commission, BA-PA, and the CLEC community with sufficient information upon which to objectively measure the delivery of non-discriminatory access to CLECs. In order for this metric to provide any meaningful measurement, it must include a broader definition than that proposed by BA-PA. We agree with the ALJs that it is essential that BA-PA report on the level of service it provides to its affiliates, and we shall adopt the recommendation of the ALJs on this issue. BA-PA shall report the service quality delivered to all BA-PA affiliates and subsidiaries (CLEC and non-CLEC) which order services, UNEs, or interconnection from BA-PA.⁵ (Kinard Direct at 37.)

Pacific Bell and Verizon California (legacy GTE) have been voluntarily reporting all affiliate data for some time. The metric report structure for the California Joint Partial Settlement metrics lists under reporting structure for the various metrics "Individual CLECS, CLECs in the aggregate, By ILEC (if analog applies) and *ILEC affiliates*." (Emphasis added). (Kinard Direct at 38.)

⁴ Case No. U-11830, In the matter of Ameritech Michigan's submission on performance measures, reporting and benchmarks, pursuant to the October 2, 1998 order in Case No. U-11654, pp. 12-13.

⁵ P-00991643, Joint petition of NEXTLINK Pennsylvania, Inc., RCN Telecommunications Services of Pennsylvania, Inc., Hyperion Telecommunication, Inc., ATX Telecommunications, Focal Communications Corporation of Pennsylvania, Inc., CTSI, Inc., MCI CLEC Coalition, e.Spire Communications, and AT&T Communications of Pennsylvania, Inc., for an Order Establishing a Formal Investigation of Performance Standards, Remedies, and Operations Support Systems Testing for Bell Atlantic-Pennsylvania, p. 21.

BellSouth should include in its reporting all affiliates that buy interconnection or unbundled elements or that resell BellSouth's services. Such affiliates would include any future BellSouth long distance affiliate, to ensure it is not being given more favorable treatment than BellSouth's combined local and long distance competitors. Any affiliate, as affiliate is defined by the Act, which buys services similar to those purchased by CLECs should be included. (*Id.*)

In the New York 271 Order, the FCC did not state that it would not consider affiliate data, and there is no basis for believing the FCC would not consider such data if available. The New York commission had not addressed affiliate reporting when it first developed its carrier-to-carrier guidelines and New York CLECs did not press the issue because Verizon had virtually no affiliates with which they competed. Since then, Verizon has entered the long distance business in New York through two affiliates and has established a separate data affiliate. Recently the New York commission has required that Verizon report its affiliate data separately from CLEC data for study on how it will be used in determining parity in the future. (Kinard Direct at 38 – 39.)

In some limited cases for line sharing metrics, Verizon's data affiliate already is designated by the New York commission for use in determining parity performance. Specifically, in the Case 97 C 0139 *Order Adopting Revisions to Inter-carrier Service Quality Guidelines*, issued and effective December 15, 2000, the New York commission stated:

To provide meaningful information on parity performance of the ILEC, the ILEC affiliate data should be reported separately. That is if affiliate data is reported together all other competitor data, the ILEC performance to competitors may be masked. As these data may have competitive significance, the separately reported affiliate data should be provided to

the Carrier Working Group through the existing protective order under which data are shared. (Kinard Direct at 39.)

Further, in its response to the CLEC Coalition's motion for Clarification and Reconsideration in Georgia in Docket 7892-U, the Georgia Commission found that "BellSouth shall not include its Affiliate data in the remedy calculation as it applies to industry-level remedies." (Kinard Direct at 39.) The Commission should require BellSouth regarding to separate affiliates' data from that of CLECs. If an affiliate is receiving unlawfully preferred service, this would only serve as a thumb on the scale to make the treatment of the competitors look better as a whole than it actually is. Kinard Direct at 39.) The affiliate information should be reported separately by each affiliate (data, wireless, future long distance, or other) with activity in the metric category.

ISSUE: REVIEW OF PERFORMANCE PLAN

From time to time the Commission should review the performance plan that it adopts, including metrics to be reported, benchmarks, standards, etc. (Kinard Direct at 25 – 26.)

Other states have set six-month reviews of metrics. Georgia has ordered a staff review to take place every six months. See *In re: Performance Measures for Telecommunications Interconnection, Unbundling and Resale*, Docket No. 7892-U, Order on Reconsideration and Clarification, May 7, 2001. The New York Carrier-to-Carrier Working Group continues to meet monthly, developing a report on consensus and nonconsensus items to be referred to the commission, accompanied by an Administrative Law Judge recommendation, for a vote. Texas also has adopted a review process for SBC's metrics. Although ILECs often dispute new measures or changes, claiming that Verizon-NY and

SBC-Texas received 271 approval without them, both Texas and New York have added new metrics, modified standards, and taken other actions post-271 approval.

Such reviews are different than annual audits, which are intended to verify that metrics are being reported properly with accurate coding of exclusions and adherence to reporting guidelines. (Kinard Direct at 26.) Periodic review of Kentucky's performance plan is necessary to ensure that metric and remedy systems are appropriate to open local markets in the first place as well as to prevent backsliding after 271 approval. (Id.)

REMEDY PLAN ISSUES

ISSUE: THE NEED FOR A REMEDY PLAN

Developing appropriate performance standards is only the first step to ensuring that CLECs receive parity service from BellSouth as required by the Act.⁶ CLECs believe that self-executing remedies are needed to enforce the market opening provisions of § 251 of the Act and are not solely designed to prevent Section 271 backsliding as BellSouth contends. Nondiscriminatory access to services and facilities must be evident in BellSouth's performance in order for BellSouth to show that its markets are irreversibly open to competition.⁷ A remedy plan is important to ensuring local competition because BellSouth is in the unique position of being the main supplier of services to CLECs and is, at the same time, the CLECs' main competitor. As such,

⁶ The performance standards this Commission should adopt are discussed in the testimony of Karen Kinard of MCI WorldCom also filed today.

⁷ The FCC has confirmed that the RBOCs' performance for CLECs will continue to be evaluated under the public interest standard in determining whether markets are irretrievably open to competition. See *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communication Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Red. 3953 ¶ 8 (F.C.C. Dec 22, 1999) (No. CC 99-295, FCC 99-404) ("*Bell Atlantic New York Order*") (reaffirmed that the adoption of a performance measures system that includes a "strong financial incentive for post-entry compliance with the section 271 checklist" as particularly important in opening local markets to competition consistent with the Telecommunications Act of 1996).

BellSouth is capable of seriously compromising a CLEC's ability to enter the local market and successfully serve its customers. (Bursh Rebuttal at 24-26)

Therefore, a remedy plan must be established that creates an economic incentive for BellSouth to cooperate and provide quality service, rather than to discriminate against competing providers. If there is no incentive for BellSouth to abide by the established performance standards, then those standards are useless. Remedies must be significant enough to ensure that it is more beneficial for BellSouth to comply with the performance standards than to pay the remedies for non-compliance. Otherwise, BellSouth would likely view insufficient remedies as merely the cost of doing business. Without significant remedy provisions, competition will not develop and BellSouth will continue to monopolize the local telephone market in Kentucky. (*Id.*)

ISSUE: WHAT PRINCIPLES PROVIDE THE FOUNDATION OF AN EFFECTIVE REMEDY PLAN?

Several principles should guide the analysis of whether a remedy plan is sufficient. Those principles are:

1. Remedies must be great enough to motivate BellSouth to meet its obligations under the Act to provide nondiscriminatory access to services and facilities
2. Remedies generated under the enforcement mechanisms should not be allowed to become excessive
3. An effective plan should provide reasonable assurances that the reported data is accurate. (*See Bell Atlantic New York Order* ¶ 433.)
4. Remedies must be self-executing – no delay, no expense to the harmed CLEC, no litigation required to invoke remedies. The FCC has stated that an effective enforcement plan shall “have a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal.” (*Id.* ¶ 433.)

5. Remedies must escalate according to the duration and magnitude of poor performance.
6. The remedy plan should be structured so that it is simple to implement and administer. (This is especially important in light of the complexity of BellSouth's proposal.)
7. Interest must accumulate on monetary payments that are not paid in accordance with the remedies plan.

(Bursh Rebuttal at 26-27).

ISSUE: WHAT IS THE APPROPRIATE ENFORCEMENT MECHANISM TO BE EMPLOYED TO DETERMINE IF BELLSOUTH IS PROVIDING COMPLIANT PERFORMANCE?

There are several attributes of an appropriate remedy plan about which there is agreement between the CLECs and BellSouth. Both parties agree on a two tiered remedy structure with Tier 1 remedies being paid to individual CLECs and Tier 2 remedies being paid to the state. The parties agree on the use of retail analogs, and the use of benchmarks where no retail analog is available. The parties also agree that a statistical methodology should be used for determining compliance with retail. The parties also agree that there should be an adjustment for small sample sizes when a benchmark is used as the performance standard. The parties agree on the use of the balancing critical value methodology. There are, however, significant unresolved matters about which the parties differ.

The parties disagree, among other things, on whether the remedy plan should be measure based or transaction based, the statistical methodology to be used to determine compliance, the value of the delta parameter to be used in conjunction with the balancing methodology, the method to be used in calculating remedies, how Tier 2 remedies should

be calculated and how to adjust benchmarks for small sample sizes. The discussion below will focus on those matters about which the parties are disagreement.

Remedy Plan Structure:

As stated above both parties propose a two-tiered structure for the remedy plan adopted by this Commission. The parties disagree, however, on whether the remedy plan should be measure based or transaction based. BellSouth is recommending that remedies accrue on a transaction basis. (Varner Direct at 83) BellSouth believes that the purpose of a remedy plan is to ensure that BellSouth provides wholesale services, not just individual functionalities, at parity so that CLECs can compete for customers and provide matching services. (Taylor Rebuttal at 36, 40) BellSouth believes that whether it falls short or exceeds the quality standard for each and every sub-measure or functionality is less important than whether the wholesale services, which those sub-measures and functionalities collectively make-up, meet quality standards set for them. (*Id.*) BellSouth takes the position that only if a performance failure for a single sub-measure were likely to cause a performance failure for the CLEC transaction as a whole, would it make sense to conduct tests and pay remedies at the sub-measure level. (*Id.*).

Accruing remedies on a transaction basis as set forth in SEEM, however, minimizes BellSouth's liability because a significant number of CLECs are currently at an embryonic level of activity. (Bursh Rebuttal at 44) Basing penalties on these low volumes would not generate sufficient remedies to motivate compliant behavior by BellSouth. (*Id.*) Moreover, while BellSouth's plan is transaction based, as discussed more fully below, BellSouth does not pay remedies for every failed CLEC transaction. (Tr. V. 1 at 276)

Additionally, a transaction based plan would potentially reward BellSouth for its poor performance. For example, BellSouth's poor service to CLECs in month one could cause CLECs to lose customers in month 2, thereby reducing the number of CLEC transactions in succeeding months, which would ultimately reduce the amount of remedies BellSouth would have to pay. Such a structure will not provide BellSouth with the necessary incentive to meet its obligation under the Act to provide CLECs with the same level of service it provides to its own retail operations. Consequently, CLECs propose that remedies should accrue on a per measure basis.

In a measures based plan, remedies accrue at the level in which the comparisons are made (i.e. at the measure/sub-measure level). Thus, the remedy amount is a direct function of the departure of BellSouth's performance from parity. Moreover, a measure-based plan as proposed by CLECs will generate more remedies as the severity of the discriminatory performance increases. (Bursh Rebuttal at 44) The most effective way of ensuring that BellSouth provides CLECs with parity service is to ensure that BellSouth meets the individual performance standards for the measures adopted in the remedy plan. If BellSouth is providing parity service for individual measures, it will more than likely be providing wholesale services at a parity level.

Under the CLEC PIP, remedies would be made based upon a finding of discrimination for a particular measure, independent of the number of transactions and the type of measure. Thus, a measure-based plan can still generate remedies significant enough to motivate BellSouth's performance even though CLEC transactions volumes are low. Additionally, a measured-base plan will not generate fewer remedies with persistent discrimination by BellSouth.

Finally, as discussed more fully below, because of serious concerns with the way BellSouth determines the number of transactions for which it will pay remedies, the Florida Commission ordered BellSouth to develop a measure based plan. (*Florida Order at 162*) Although BellSouth has filed a motion seeking reconsideration of some aspects of the remedy plan ordered by the Florida Commission, BellSouth did not seek reconsideration of the Florida Commission's determination that remedies should be paid on a measure basis.

Therefore, CLECs believe that at a time when they are struggling to get into market, a measure based plan, rather than the transaction based plan in SEEM, would be more effective in motivating compliant performance on the part of BellSouth. (*Id*)

Statistical Methodology for Determining Compliance:

As previously stated, the parties agree with the use of a statistical test to determine compliance for performance measures with a retail analog. The parties disagree, however, on the appropriate test statistic to use. BellSouth has proposed the use of the truncated z methodology as the statistical test. (*Mulrow Rebuttal at 4*) The CLECs have proposed the use of the modified z test statistic. (*Bell Rebuttal at 27; Bursh Rebuttal at 29*) Both BellSouth and CLECs agree on the use of a balancing methodology to determine the critical value used in conjunction with the test statistic in making parity determinations. (*Bell Rebuttal at 28; North Carolina Tr. V3 at 53*)

Although the parties agree to use the modified z score to determine the test statistic for each sub-measure, they differ in regard to the method for generating the test statistic that will be used to determine whether BellSouth is providing parity service. CLECs recommend the use of the modified z scores calculated for each sub-measure to determine whether BellSouth has provided parity performance. (*Bursh Rebuttal at 29*) The New York

and Texas Commissions have adopted the modified z test for determining compliance. After calculating the modified z score for each sub-measure, however, BellSouth proposes the additional step of aggregating the individual test statistics for a group of sub-measures into one overall statistic-- the truncated z score. (Mulrow Rebuttal at 3) That one test statistic would then be compared to the critical value to make a parity determination. (*Id.* 4)

CLECs have no theoretical objection to the truncated-z. As Dr. Bell explained, however, if dissimilar things are aggregated, the use of truncated z can mask discriminatory performance. (Bell Rebuttal at 30) Dr. Bell testified that the truncation step, (setting $Z_j^* = \min(0, Z_j)$), is designed to keep a single cell where the CLEC's customers receive much better than parity service from canceling out poor service in other cells. However, it does not prevent parity, or better, service in a large number of cells from concealing very poor service in other cells. (*Id.*)

Dr. Bell further testified that the more parity cells that are included, the greater the chance is that truncated z will not be significant. The reason is that each cell that is found to be in parity increases the value of the truncated z statistic (high values are taken as evidence of parity). In addition, each new cell (whether in parity, or not) decreases the balancing critical value that truncated z must fall below to be judged significant. Similarly, parity service in just a few large cells can conceal very poor service in much smaller cells because truncated z weights the modified z scores according to sample sizes in the cells. (*Id.*) CLECs believe that the level of aggregation proposed by BellSouth in SEEM is inappropriate and therefore masks discrimination by BellSouth.

Ms. Bursh testified that the inadequate level of disaggregation in SEEM facilitates the consolidation of dissimilar products for comparisons. (Bursh Rebuttal at 57) As an

example, Ms. Bursh pointed to the fact that within SEEM BellSouth aggregates DS1 Loops and 2-Wire Analog Loops for provisioning metrics such as Average Completion Interval, even though each of the various UNEs has a different provisioning interval. The interval for one DS1 Loop is 23 days and the interval for one 2-Wire Analog Loop is 4 days.⁸ Aggregating these products does not contribute to “like-to-like” comparisons, masks differences and makes detection of inferior performance less likely. (*Id.*) It allows discrimination on high-revenue/low volume products such as DS1s or DS3s to easily be concealed through consolidation with a dissimilar low-revenue high volume product such as an Analog Loop. (*Id.*) Based upon BellSouth’s inappropriate aggregation of different products, the CLECs propose that the Commission adopt the use of the modified z score for making parity determinations at the sub-measure level.

BellSouth does not believe that it is necessary to disaggregate to the same level for both compliance reporting and remedy reporting. (Varner Rebuttal at 72). As an example, BellSouth points to xDSL services. In his testimony Mr. Varner asserts that HDSL, ADSL, and UCL are all provided on a pair of copper wires. He contends that the service are distinguishable based on the electronics installed on the customer end by the CLEC, and perhaps by the maximum length of the loop used for each service. (*Id.*) Therefore, Mr. Varner believes that BellSouth’s aggregate performance in ordering, provisioning and maintaining all of these diverse loops is appropriate for determining any degree of disparate treatment for the purpose of assessing remedies. Mr. Varner contends

⁸ BellSouth Products & Services Interval Guide – Network And Carrier Services, Customer Guide CG-INTL-001, Issue 3b-December 2000

that such aggregation is also useful because taken individually the volumes for those services might be too small to accurately measure. (*Id.*)

While it might be possible to address the CLECs' concerns with BellSouth's implementation of truncated z through further disaggregation as did the Florida Commission, BellSouth has not objected to the use of the modified z statistic, and in fact uses it as part of its truncated z methodology. Thus, the simplest way for the Commission to address this matter would be to use the modified z test statistic as proposed by the CLECs to determine BellSouth's compliance with performance standards. Nevertheless, should the Commission decide to use the truncated z methodology proposed by BellSouth, the Commission should order the same level of disaggregation for remedies as for reporting purposes. Establishing the same level of disaggregation for remedies and performance reporting put no additional burden on BellSouth.

In its Final Order, the Florida Commission, which also adopted the Truncated z statistical methodology, rejected BellSouth's SEEM disaggregation. In rejecting BellSouth's position, the Florida Commission stated:

BellSouth is proposing only seven levels of product disaggregation for penalty determination. We find that this product reaggregation is inappropriate for penalty determination We find that BellSouth product disaggregation for compliance shall match what it has recommended, and we have approved, for product reporting purposes We estimate there would be over 825 levels of disaggregation for compliance reporting and penalties for Tier 1 and over 875 total levels of disaggregation for compliance reporting and penalties for Tier 2.

(Florida Final Order at 102)

Parameter Delta Value:

As discussed above, as part of the statistical methodology BellSouth and the CLECs support the use of a balancing critical value. (North Carolina Tr. V.III, p. 53; Bell Rebuttal at 28) In using the balancing methodology, some level of disparity in service is allowed to exist between the level of service BellSouth provides to its own retail operations and the level of service BellSouth provides to CLECs. (North Carolina Tr. V.III, p.53). The parameter delta measures the size of the violation. (Bell Rebuttal at 34) The smaller the delta is, the less disparity it allows. (North Carolina Tr. V. III, p. 53) Ideally, this is the value that would yield a balance between the possibility that the data would indicate discrimination where it did not exist (Type 1 error) and the possibility that a random error would be made it appear that there was no discrimination when, in fact, there was non-parity performance (Type 2 error).

This “balancing critical value,” which computes an appropriate critical value, however, cannot be completely developed until the value of the parameter delta is determined. (Bell Rebuttal at 33) The parties agree that this decision should be based on business judgment. (North Carolina Tr. V.III, p. 27; Bell Rebuttal at 34) Dr. Bell testified that this should be done by determining the smallest violation of parity that is considered material. (*Id.*) Nevertheless, Dr. Bell and Dr. Mulrow agree that statistics can help guide the Commission’s decision by demonstrating the impact of various values of delta. (North Carolina Tr.V.III, p.54)

The CLECs propose that this Commission adopt .25 as the parameter delta value. (Bell Rebuttal at 34) BellSouth, on the other hand, proposes a delta equal to 1.0 for Tier 1 measures and .50 for Tier 2 measures. (Varner Direct at 87) The differences when applying the proposed values are dramatic. Therefore, it is extremely important that the Commission select the right value.

Dr. Bell has presented two tables in his testimony to demonstrate the impact on CLECs customers if the parameter delta value is set at .25, .50 and 1.0. (Bell Rebuttal at 35-

36) BellSouth does not dispute the information in the Tables, but says it does not use delta to define the alternative hypothesis for proportion measures. (Mulrow Rebuttal at 10) BellSouth does use delta to define the alternative hypothesis for mean measures. Moreover, Dr. Bell testified that the CLECs do propose the use of delta for mean, proportion and rate measures. (Bell Rebuttal at 6-7). Specifically, CLECs propose using the arcsine-square root transformation and square root transformations of observed proportions and rates, when computing z-scores for proportions and rates. (see CLB-1) Consequently, the tables provided by Dr. Bell are helpful to guide this Commission determination of the appropriate parameter delta value.

Dr. Mulrow testified that the concept that the modified z test statistic is based upon should not be used for all measure types. (Mulrow Rebuttal at 9-10) Dr. Mulrow has presented a table to demonstrate the "odds ratio" methodology that BellSouth uses for proportion measures. (*Id.* at 12). However, BellSouth has not produced any evidence as to what values other than delta, should be used in calculating the odds ratio. Thus, the method is incomplete. (Bell Surrebuttal at 1) Dr. Mulrow also testified that whatever value of delta is chosen, BellSouth would begin making remedy payments at one-half delta. (North Carolina Tr. V.3, p. 54) While Dr. Bell agreed, he testified that setting delta at a value such that one-half delta corresponds to a material disparity violates the balancing principle, which calls for balancing Type 1 and Type 2 errors where Type 2 error is evaluated at a disparity that is equal to delta. (Bell Rebuttal at 38-39)

A review of the tables provided by Dr. Bell makes it readily apparent that setting the delta parameter at 1.0 and .50 does not provide CLECs with parity service, but rather allows BellSouth to unreasonably discriminate against CLECs and their customers without any

consequences. For example, Table 2 in Dr. Bell's testimony shows that where 1% of BellSouth's customers are receiving an unacceptable quality of service, using a delta parameter of 1.0 means that the disparity in service being provided to CLEC customers would not be material until 39.1 % of the CLEC customers are receiving an unacceptable quality of service. (*Id.* at 36) Likewise, Table 1 in Dr. Bell's testimony demonstrates that a delta value of 1.0 implies that if BellSouth takes 5 days to provide a specific service to its customers, BellSouth could take up to ten days to provide the CLEC customer with the same service before it is determined to have committed a material violation. (*Id.* at 35) While BellSouth would begin making remedy payments at one-half delta, this would still allow CLEC customers to receive poor service at an unacceptable rate as compared to BellSouth customers.

By contrast, setting the delta value at .25 as proposed by CLECs is clearly more reasonable. While a delta value of .25 still allows BellSouth to miss more than twice as many appointments for CLEC customers as for BellSouth's customers before (11.8% versus 5.0%) disparity is deemed material, it better protects the interests of CLECs and their customers, the Kentucky consumers. (*Id.* at 36) Setting the parameter delta value at a level that allows BellSouth to provide 31.9% of CLEC customers with inferior service, when it provides only 1% of its customers with inferior service, and take five days longer to provide CLECs with a service than it does its own customers, even for six months, would cripple the development of competition in Kentucky and could drive some CLECs out of business.

Moreover, setting the parameter delta values at 1.0 and .50 is clearly inconsistent with enforcing BellSouth's obligation to provide CLECs with parity service under Sections 251 and 252 of the Act. Setting a parameter delta value which allows BellSouth to escape

any consequences until its providing nearly nine times the number of CLEC customers with as poor a level of performance as its own customers does nothing to incent BellSouth to open its market to local competition or to ensure that CLECs have a fair and equal opportunity to compete for and serve customers.

CLECs have produced compelling evidence of the negative impact BellSouth's proposed delta values will have on CLECs and their customers. While the adoption of .25 does not result in a situation where BellSouth is providing CLECs customers with absolute parity service, the result yielded is far more reasonable than if the parameter delta value is set at 1.0 and .50.

Remedy Calculation:

Under the remedy calculation methodology used in SEEM, even though BellSouth's plan is transaction based, BellSouth does not pay remedies on all transactions where a violation of the performance standard occurs. The final remedy payout in BellSouth's SEEM is based on a subset of failed transactions, called the "affected volume." (Varner Direct at 83-85) The affected volume computed in SEEM equals the product of two factors: a fraction referred to as the "volume proportion" and the number of transactions, representing violations, from cells having negative z-scores. As a component of the SEEM, the remedy calculation uses a factor, a slope of $\frac{1}{4}$, which inappropriately reduces BellSouth's liability. There exist no substantiated reason for BellSouth to use a slope of $\frac{1}{4}$ to reduce the transactions that are subject to remedies. (Bursh Rebuttal at 45-46)

The "affected volume" is further reduced because the remedy calculation methodology used in SEEM determines violations at the aggregate level and applies remedies at the disaggregated level, which they say is biased toward BellSouth. (*Id.*) As

Ms. Bursh explained, the SEEM remedy calculation methodology improperly excludes failed transactions from the cells with positive z scores, even though these cells have already contributed to the aggregate z. (*Id.*) In other words, BellSouth will use some failed transaction in making the compliance determination, but neglect to use these same failed transactions in determining the remedy amount. The result is that BellSouth will make smaller payments than if the volume proportion, which is calculated from the state aggregate-z, is applied to all cells. (*Id.*) Consequently, BellSouth will only pay remedies on a small fraction of the CLEC transactions where it has violated the designated performance standards. (*Id.*)

The example BellSouth provided to illustrate its remedy calculation methodology clearly shows that under SEEM, BellSouth is allowed to escape paying remedies for a large number of CLEC transactions where BellSouth is in violation of the performance standard. (AJV-3, Appendix E, p. 39) Mr. Varner testified that the example accurately reflects what could happen using BellSouth's remedy calculation methodology. (Tr. V. 1 at 262) In BellSouth's example, there are a total of 96 CLEC transactions where BellSouth missed the required performance standard. According to BellSouth's example, however, it would only be required to pay remedies on 29 of the 96 transactions. (*Id.* at 265)

Thus, the example shows that the use of the SEEM remedy calculation methodology could result in BellSouth not paying remedies on a significant number of transactions where BellSouth violated the performance standard. Dr. Bell testified that the balancing critical values in BellSouth's example of its remedy calculation are wrong by as much as a factor of 70 and therefore all three BellSouth tables give a distorted impression of the SEEM remedy procedure. (Bell Rebuttal at 42). Moreover, as Dr. Bell pointed out, BellSouth

presented no evidence to show that its remedy calculation produces any semblance of a true affected volume. (*Id.* at 43) A remedy calculation that produces such a result will not incent BellSouth to provide CLECs with parity service, or to open its market to local competition as envisioned, and required by the Act.

In contrast to BellSouth's remedy calculation, the CLECs remedy calculation is a simple quadratic function. (Bursh Rebuttal at 34). The penalty amounts range from \$2500 for a basic failure to \$25,000 for a severe violation. (Tr. V. II at 141-1420 Ms. Bursh testified that the remedy amounts in the AT&T PIP were established at a level that the CLECs believe, based upon their collective business judgment, will deter BellSouth from engaging in discriminatory conduct. (Tr.V. 2 at 169) The calculated remedy is a function of the severity of the failure as measured by the magnitude of the modified z statistic. Severity of the performance failure is determined based on the ratio of the modified z score to the balancing critical value. (Bursh Rebuttal at 34). When a benchmark serves as the performance standard, the measurement establishes a performance failure directly and assesses the degree to which the performance departs from the standard. A performance failure should be declared if the calculated performance is not equal to or greater than the benchmark. (*Id.*)

Chronic Tier I violations incur additional remedies. The AT&T plan calls for a \$25,000 payment to the CLEC for "chronic" or recurring performance failures. The \$25,000 payment is levied beginning with the third month that a particular submeasure is missed. The \$25,000 monthly payment continues for every month until the performance for that submeasure returns to the "compliant" level as shown above. One month of

compliant performance resets the clock. (*Id.* at 35-36) The AT&T PIP also includes a market penetration adjustment for Tier 2, which is discussed separately in this brief.

Like Ms. Bursh, BellSouth witness Dr. Taylor believes that the goal of the remedy plan is to deter discrimination. (Taylor Rebuttal at 37). Dr. Taylor believes, however, that the penalties in the AT&T plan are arbitrary and capricious in that they are “one size fits all.” Dr. Taylor does not believe that all functions or performance metrics have the same economic value. (*Id.* at 49) Dr. Taylor testified that if the public policy goal is to provide BellSouth a greater economic incentive to comply with performance standards than not to comply, the size of the penalty payments should vary directly and proportionally with the economic disparity. “Equating more serious performance disparities with more severe economic consequences, the ideal system of penalties should be calibrated to the economic seriousness of the performance disparities.” (*Id.* at 50) Dr. Taylor believes that the CLEC plan attempts to determine severity based on statistical criteria and does not correlate the size of the penalty with the economic harm. Dr. Taylor believes that business judgment and the passage of time is the best approach to measuring economic value. (*Id.* at 53).

Dr. Taylor supports BellSouth’s penalty payments, which he asserts are based on (1) the type of underlying transaction, (2) the estimated economic seriousness of the violation, and (3) the duration of the violation. (*Id.* at) Dr. Taylor admits, however, that he does not know how BellSouth arrived at the numbers in its fee schedule. (Tr. V. 1 at 322) Moreover, Dr. Taylor testified that he could not say that the amounts in BellSouth’s fee schedule were set at a level, which is necessary to deter discriminatory performance by BellSouth (*Id.*)

Mr. Varner, however, made clear in his testimony before the Commission that BellSouth’s fee schedule was not derived from a scientific process based on economic value

or set at a level that is necessary to deter discriminatory performance on the part of BellSouth. Contrary to Dr. Taylor, Mr. Varner testified that the purpose of remedies was not to motivate BellSouth not to discriminate against CLECs in its provision of service. (Tr. V. 1 at 288-289). Mr. Varner testified that the remedy amounts in BellSouth's fee schedule alone were not designed, in and of themselves, to deter discriminatory conduct on the part of BellSouth. (*Id.* at 289) Mr. Varner and BellSouth believe that remedies can be set at a level that will not deter BellSouth from providing discriminatory service to CLECs. (*Id.* at 290) Mr. Varner and Dr. Taylor also testified that the fee schedule proposed by BellSouth does not take into account the potential loss of revenue or harm to CLECs that results from BellSouth's performance failure. (*Id.* at 285, 327-328) As shown by Mr. Varner's testimony, neither BellSouth's remedy calculation, nor BellSouth's fee schedule was designed to deter discriminatory performance by BellSouth.

Like the CLECs, the Florida Commission expressed serious concerns with BellSouth's parity gap and affected volume calculation. The Florida Commission stated, ". . . the BellSouth plan is predicated on parity gap calculations that are very questionable. . . ." (*Florida Order* at 162) Thus, given what they believed to be "serious issues with BellSouth's parity gap and affected volume calculations," the Florida Commission ordered BellSouth to develop a measure based plan. (*Id.*)

The quadratic equation proposed by the CLECs is a more reasonable and appropriate way of calculating remedies than BellSouth's remedy calculation. The CLECs quadratic equation is far less subjective than the remedy calculation and fee schedule proposed by BellSouth. Moreover, the quadratic equation proposed by the CLECs can be easily adjusted by changing the coefficients should it be determined that

the remedy amounts are to high or to low. (Tr. V. 2 at 142). Moreover, unlike the remedy amounts proposed by BellSouth, the remedies proposed by the CLECs were set at a level that the CLECs believe will deter discriminatory performance by BellSouth. (Id. at 142-143, 166-167) Thus, the CLECs' proposal will better achieve the plan goal of deterring discriminatory performance by BellSouth and is the method the Commission should adopt.

Benchmark Adjustment For Small Sample Sizes

Benchmark measures are "pass/fail". Benchmarks establish the minimum level of performance Bellsouth must provide to CLECs. BellSouth either meets the performance standard or it does not. However, BellSouth and the CLECs recognize that in some instances the number of transactions may be small. In those situations, it could be harder for BellSouth to meet a particular benchmark. (Bursh Rebuttal at 35) Therefore, both BellSouth's SEEM and the AT&T's PIP would allow for some adjustment to the benchmark for small sample sizes. The parties differ, however, on how much of an adjustment should be made. The AT&T's Benchmark Adjustment Table is provided in Exhibit CLB-2. BellSouth's benchmark adjustment table is provided in Exhibit AJV 3, Section E, at 42. The Benchmark Adjustment Table proposed by the CLECs is most consistent with the goal of the Act to require ILECs to provide CLECs with parity service and a reasonable opportunity to compete for customers.

Consider this example: The benchmark for a particular submeasure requires BellSouth to perform a function in 2 hours, 95% of the time. Due to disaggregation, there could be a situation where there are only 4 transactions that could be used to determine BellSouth's performance. With only 4 transactions, BellSouth would fail this

benchmark if it misses the measure only one time. The AT&T PIP allows for adjustments to be made when the size of the data set is very small, such as in the example above. The AT&T's Benchmark Adjustment Table would allow BellSouth to achieve 80% performance or miss one transaction before a non-compliant determination is made in this instance. (Bursh Rebuttal at 35) By contrast, BellSouth's 95% Confidence Small Sample Size table would allow BellSouth to miss two transactions or achieve 60% performance before a non-complaint determination is made. (Exhibit AJV 3, Section E at 42)

While some measure of forgiveness should be allowed BellSouth when sample sizes are small, allowing BellSouth to claim parity performance while achieving a 60% performance level would not achieve the Act's goal of parity for CLECs. Therefore, the Commission should adopt the Benchmark Adjustment table proposed by the CLECs.

Tier 2 Remedies

Both the AT&T's PIP and BellSouth's SEEM contain additional remedies for discriminatory performance by BellSouth that affects more than one CLEC. Tier 2 of the AT&T's PIP and Tier 2 of BellSouth's SEEM are designed to address discrimination that affects the CLEC industry as a whole. Under both parties' remedy plan, the remedies due under Tier 2 would be paid to a state fund. However, the parties differ regarding when remedies under Tier 2 should be triggered. Additionally, BellSouth objects to PIP's market penetration adjustment for Tier 2 measures.

Under AT&T's plan, payments for Tier 2 violations are paid if the difference in any given month between BellSouth's performance for itself or affiliates and that which it provides to the aggregate of CLECs falls below the designated level. (Bursh Rebuttal at 35)

Penalties for Tier 2 violations would also increase depending on the severity, with parameters defined for those violations that are market impacting and those designated as market damaging or market constraining. Severity of performance is determined based on the ratio of the z-score to the balancing critical value. (*Id.*)

In addition, a factor “n” would be applied as a multiplier to the basic penalty amount. The factor “n” corresponds to the number of CLEC served lines in Kentucky. The value of “n” would decrease as the CLEC market penetration increases. The CLEC market penetration adjustment is devised to encourage BellSouth to open its market by reducing its exposure to penalties as it does so. (*Id.* at 37)

On the other hand, BellSouth’s SEEM attempts to avoid the imposition of consequences by imposing artificial timing requirements before penalties apply under Tier 2. Under BellSouth’s SEEM, Tier 2 remedies would only be triggered if BellSouth is non-compliant on a particular measure for three consecutive months. (Tr. V.1 at 248) Consequently, under BellSouth’s proposal, BellSouth could miss a measure for two months, be compliant for one month and avoid Tier 2 sanctions altogether. (*Id.*) Moreover, because SEEM does not include all measures in Tier 1, BellSouth could potentially pay no remedies even though it has violated the performance standard for a particular measure for several months. (*Id.*) Thus, SEEM would permit a pattern of Tier 2 violations, so long as they were timed so as not to occur for three consecutive months. Linking Tier 2 remedies to three consecutive months of failure, as opposed to a monthly failure, needlessly delays self-enforcement of consequences for violations of the performance requirements affecting not just one CLEC, but also the entire industry.

The CLEC market penetration adjustment is designed to provide BellSouth with an extra incentive to provide CLPs with compliant support when CLP market penetration is very low. While Ms. Bursh admitted that the CLPs did not perform an analysis or study in determining the values associated with the factor “n”, she testified that if the remedy amounts were found to be too high, the quadratic function used to calculate remedies in the CLEC plan could easily be adjusted. (Tr. V. 2 at ___) The factor “n” could also be adjusted.

The design of Tier 2 remedies in BellSouth’s SEEM plan allows for the great possibility that BellSouth will not pay remedies for Tier 2, or possibly at all. The Tier 2 structure proposed by the CLECs more closely relates to the Act’s requirement that BellSouth provide CLECs with parity service.

As the remedy payments for Tier 2 measures are designed to combat industry affecting discrimination by BellSouth, it is imperative that any discriminatory performance by BellSouth that threatens the growth and maintenance of competition in Kentucky should be vigorously discouraged. Thus, while the CLEC’s market penetration adjustment does not take CLEC business plans into consideration, in order to ensure parity and benchmark performance where CLEC order volumes of advanced and nascent services are low, a market penetration adjustment should be adopted. The CLEC’s proposal can easily be implemented and adjusted if the remedy amounts prove to be onerous.

Procedural Cap Or Absolute Cap

BellSouth believes that any remedy plan adopted by the Commission should include an absolute monetary cap. BellSouth’s SEEM includes an absolute cap of 36%

of BellSouth's net operating revenue for Kentucky. An absolute cap provides a fail-safe to prevent the enforcement mechanism from spiraling out of control. (Varner Direct at 99) BellSouth disagrees with the concept of a procedural cap. BellSouth's concern is that if a procedural cap is established, BellSouth would continue to pay remedies while the Commission determined whether it should pay additional remedies above the limit set by the procedural cap. (*Id.* at 100) BellSouth argues that, if the Commission determines that BellSouth should not pay remedies above the amount of the procedural cap, it would be extremely difficult for BellSouth to recover any amounts it has paid in remedies in excess of the procedural cap. (*Id.*)

However, if the Commission deems a procedural cap appropriate, BellSouth believes that the Commission should structure the process to reduce the prospect of irreversible financial harm to BellSouth. (*Id.* at 101) BellSouth recommends that the procedural cap be set well below what would be set for an absolute cap and that remedy payments above the procedural be suspended until Commission sets an absolute cap. (*Id.*)

The CLECs do not support an absolute cap on remedy payments. The CLECs believe that the inclusion of an absolute cap on remedy payments decreases BellSouth's incentive to comply with required performance standards and gives BellSouth the opportunity to evaluate the "cost" of retaining its market share through non-compliant performance. (Bursh Rebuttal at 38)

The CLECs support a procedural cap on BellSouth's liability. A procedural cap establishes a preset level of remedies that when reached, BellSouth could seek regulatory review of additional remedy amounts that are due. However, the procedural cap would

not automatically exempt BellSouth from liability for a violation. (*Id.* at 39) If a procedural cap is adopted, it should not stop Tier 1 payments to CLPs because Tier 1 payments are intended to at least partially compensate CLPs for the harm incurred because of the performance failure. (*Id.*) Once the procedural cap is reached, BellSouth would continue to make Tier II payments into an interest-bearing registry or escrow account that earns a minimum interest rate as approved by the Commission. This addresses BellSouth's concern that it would not be able to recover any remedy payments made while awaiting a decision by the Commission. (*Id.*)

BellSouth would have the burden of showing that the amount due for poor performance to the CLPs in aggregate is not warranted. The Commission would then decide whether, and to what extent, remedies in excess of the procedural cap should be paid out. Contrary to BellSouth's proposal, the procedural cap should be set sufficiently high, so as not to negate the benefits of self-executing remedies. (*Id.*)

ISSUE: WHAT IS THE APPROPRIATE LEVEL OF DISAGGREGATION FOR PURPOSES OF DETERMINING THE AMOUNT OF REMEDY PAYMENTS?

In order to be effective any remedy plan adopted by this Commission must contain an appropriate set of performance measures and standards. The parties agree that BellSouth's performance should be measured using a retail analog, and if no retail analog is available that a benchmark should be used. It is critical for the accurate detection of discriminatory performance that retail analogs be properly specified. Use of an inappropriate retail analog allows BellSouth to actually report compliant support, even though in reality it is providing discriminatory support. (Bursh Rebuttal at 59)

For example, the retail analog for OCI-UNE Loops is Retail Residence & Business Dispatch. A significant percent of the UNE Loop observations could be UNE Analog Loops that are all dispatch-in. Dispatch-in signifies that the work is done within the Central Office. Dispatch refers to service where the work is done in the field or outside of the Central Office. Clearly, work done within the Central Office has a shorter interval than work done away from the Central Office. Thus, BellSouth would always appear to be providing longer intervals for its own retail operations (i.e. compliant support) primarily because the retail analog in this example is inappropriate. (*Id.*) Thus, it is important that retail analogs that allow for like-to-like comparison be used.

As the Florida Public Service Commission noted, “benchmarks set lower than 90 or 95 percent do not generally allow ALECs a reasonable opportunity to compete.” (*Florida Order* at 145) The CLECs agree with the Florida Commission’s conclusion that setting higher standards is necessary to motivate BellSouth’s performance. The CLEC’s position regarding the appropriate retail analogs and benchmarks to be adopted in this docket is discussed above and is contained in the testimony filed by Karen Kinard of WorldCom. As it pertains to the enforcement plan, the CLEC Coalition believes that the same performance standards should apply for determining remedies, as applies to performance reporting by BellSouth. There is no logical reason for making any distinction in the performance standards.

Both BellSouth and CLECs agree that an appropriate level of disaggregation is important because measurements and reporting frequently occur only at this level. (Varner Direct at 14; Bursh Rebuttal at 16) Both CLECs and BellSouth agree that disaggregation should proceed to a level where like-to-like comparisons can be made.

BellSouth states that its position endorses “like-to-like” comparisons. However, BellSouth’s has proposed disaggregation at a more granular level for reporting purposes than for remedy purposes. For example in BellSouth’s Permanent SQM there are some 21 levels of product disaggregation for the Order Completion Interval measure, while there are only eight levels of disaggregation for the same measure in SEEM. (Exhibit AJV-2, 3.10, 3.12). Similarly, Reject Interval has 17 levels of product disaggregation in BellSouth’s SQM, but BellSouth is only proposing one level of disaggregation in SEEM. (Exhibit AJV-2, 2.20-2.22). Therefore, BellSouth’s performance on a large number of service requests, represented as partially mechanized and non-mechanized LSRs, is not subject to remedies, even though BellSouth’s performance may be non-compliant. (Bursh Rebuttal at 57)

Moreover, the inadequate level of disaggregation in SEEM facilitates the consolidation of dissimilar products for comparisons. (*Id.*) As an example, within SEEM BellSouth aggregates DS1 Loops and 2-Wire Analog Loops for provisioning metrics such as Average Completion Interval, even though each of the various UNEs has a different provisioning interval. (*Id.*) The interval for one DS1 Loop is 23 days and the interval for one 2-Wire Analog Loop is 4 days.⁹ Aggregating these products is inappropriate and does not contribute to “like-to-like” comparisons. (*Id.*) Moreover, such aggregation masks differences and makes detection of inferior performance less likely. Specifically, it allows discrimination on high-revenue/low volume products such as DS1s

⁹ BellSouth Products & Services Interval Guide – Network And Carrier Services, Customer Guide CG-INTL-001, Issue 3b-December 2000

or DS3s to easily be concealed through consolidation with a dissimilar low-revenue high volume product such as an Analog Loop. Consequently, insufficient product disaggregation will allow BellSouth to influence the type and pace of developing competition. (*Id.*)

Additionally, BellSouth's SEEM contains only a small subset of the measures BellSouth proposes to report on for the Kentucky Commission on a permanent basis. Consequently, many important aspects of BellSouth's performance critical to the CLECs' ability to compete in the local market will not be subject to remedies under BellSouth's plan. (*Id.* at)

As an example, BellSouth acknowledges that FOC Timeliness is a key measure for CLECs. (Varner Direct at 74) Nevertheless, BellSouth excludes FOC Timeliness from Tier I of SEEM. (Bursh Rebuttal at 55) Without a FOC, CLECs cannot provide their customers with an expected date of service. End user customers are not willing to rely on providers who cannot provide something as simple as a service due date in a timely manner. Therefore, monitoring BellSouth's performance in this area is critical to CLECs. Under SEEM, however, an individual CLEC can experience excessively long intervals before receiving FOCs from BellSouth, and BellSouth would not incur any remedy. In other words, BellSouth can hinder an individual CLEC's ability to provide its customers with timely notice of service without a consequence to BellSouth. (*Id.*) BellSouth has not provided any satisfactory justification for excluding this measure from Tier I of SEEM.

In an attempt to justify its exclusion of measures from SEEM, BellSouth continues to imply that the measures in SEEM were patterned after those used in New York and Texas. Contrary to BellSouth's suggestion, however, the measures in BellSouth's SEEM

were not selected in the same manner as the measures contained in the New York Bell Atlantic Plan. In New York, the CLECs participated in developing the list of comprehensive measures from which the enforcement measures were selected. The measures in SEEM, however, were unilaterally selected by BellSouth without any direct input from the CLEC community. (Bursh Rebuttal at 14-15) Mr. Varner acknowledged in his direct testimony that the New York and Texas Commissions charged the CLECs with identifying the measurement set that was most customer impacting. (Varner Direct at 89) In this instance, BellSouth unilaterally made its determination of the measures that are “key” CLEC customer impacting measures. (Bursh Rebuttal at 52) While BellSouth has been ordered to include certain measures requested by CLECS in its SQM and SEEM, BellSouth has not requested and has even ignored input from the CLECs regarding the measures that should be included in its SQM and SEEM.

Moreover, BellSouth’s reliance upon the FCC’s New York Bell Atlantic Order for support of its position that the Enforcement Plan should not include all measures is misplaced. In its Bell Atlantic Order, the FCC simply stated that the measures the New York Commission selected for inclusion in its remedy plan were sufficient. The FCC did not, however, exclude the possibility that in a different circumstance an appropriate enforcement plan should include all measures. This is such a circumstance.

For example, BellSouth does not include Speed of Answering In Order Center as an enforcement measure in SEEM. As the CLEC testimony conveys, hold times to the LCSC are unbearably long and hinder the ability of CLECs to be responsive to their customers. Even though the CLEC customer is directly impacted by LCSC hold times,

BellSouth has neglected to include this measure in SEEM. (*Id.* at 53) Additional measures that BellSouth decided to omit from its remedy plan include:

- Service Inquiry with LSR Firm Order
- Mean Held Order Interval
- Average Jeopardy Notice Interval
- Percentage of Orders Given Jeopardy Notice
- Average Completion Notice Interval
- Coordinated Customer Conversion – Average Recovery Time
- Speed of Answer Performance/Average Speed to Answer-Toll
- Speed to Answer Performance/Percent Answered within “x” seconds – Toll
- Speed to Answer Performance/Average Speed to Answer – DA
- Speed to Answer Performance/Percent Answered with “X” Seconds - DA
- Collocation Average Response Time
- Collocation Average Arrangement Time
- Change Management Notice Average Delay Days
- Change Management Documentation Average Delay Days
- Meantime to Notify CLEC of Network Outage
- Recurring Charge Completeness
- Non-Recurring Charge Completeness
- Database Update Interval
- Database Update Accuracy
- NXX and LRNs Loaded by LERG Effective Date
- Notification of Interface Outages (*Id.*)

BellSouth attempts to justify the elimination of these measures by arguing that they are “correlated” or “parity by design.” (Varner Direct at 91) The CLECs and BellSouth agree that remedies should not apply to measures that are shown to be duplicative or highly correlated. (Varner Rebuttal at 29-30; Bursh Rebuttal at 55) The parties disagree, however, regarding the procedure that is necessary to determine that measures are duplicative or correlated. The CLECs believe that an industry-developed correlation analysis is required to accurately determine whether there exists any correlation between measures. As Ms. Bursh testified, until an industry-developed correlation analysis can be conducted, any determination regarding the correlation between measures is merely a guess. Therefore, no measures should be excluded based upon alleged correlation between measures. (Bursh Rebuttal at 55).

Bellsouth has identified a number of measures that it feels are duplicative or correlated. (Varner Rebuttal, Exhibit AJV-4) BellSouth has not conducted any formal analysis in making its determination. Mr. Varner testified, however, that the overlap is not absolute, but BellSouth would be subject to the possibility of making multiple payments for the same failure. (Varner Rebuttal at 91)

Because no accurate correlation analysis has been conducted, the Commission should not exclude any measures from the remedy plan. Rather, until an appropriate analysis is conducted, to address the concerns of the CLECs and BellSouth regarding possible correlation between measures, the Commission should order all measures included in the plan, but allow only one remedy when two measures that are deemed correlated are failed.

As an alternative, the AT&T PIP proposes the creation of “families” of measures for the purpose of applying remedies where correlation between measures is suspected. (See Exhibit CLB-1) Each measurement family would be eligible for only a single remedy. Whether and to what degree a measurement family is eligible for a consequence would be determined by the worst performing individual measurement result within the family for the month under consideration. The use of measurement families eliminates the possibility of “double jeopardy”¹⁰ without making any advance value judgment regarding the usefulness of individual measurements.

¹⁰ If the measurements in the family are truly overlapping and correlated they will point to the same conclusion (incidents of failure and severity). Measurement families thus treat the incumbent preferentially: either the measurements are effectively the same and only one consequence applies or they were inappropriately grouped and the incumbent avoids one or more consequences that should have been incurred.

However, that the establishment of measurement families must be approached with extreme caution and sparingly used. At a minimum, the following conditions must be imposed:

- (1) measurements that address separate support functionality may not be placed in the same family;
- (2) measurements that address different modes of market entry may not be placed in the same family;
- (3) measurement families may not be used as a means to avoid disaggregation detail;
- (4) measurements that address (a) timeliness, (b) accuracy, and (c) completeness may not be placed within the same family;
- (5) measurement families, to the extent used, must be identical across all CLECs;
and
- (6) even if correlation can be demonstrated, measurement families must not be used to combine otherwise independent measurements of a deficient process.

Similarly, without offering any supporting evidence, BellSouth has excluded certain measures from the remedy plan contending that they offer parity by design e.g. that the metric measures a process that serves both BellSouth retail and the CLEC without differentiation and there is no opportunity for disparate treatment. (Varner Rebuttal at 74) Experience has shown that CLECs cannot rely upon BellSouth's claims regarding its inability to distinguish between CLEC orders and BellSouth orders. (Tr. V. 1 at 231-243) Mr. Varner testified before the Commission that the Acknowledge Message Timeliness (0-1) and Acknowledge Message Completeness (0-2) measures were not included as Tier 1

measures in BellSouth's permanent SQM because BellSouth could not do CLEC specific penalties on a measurement that is only calculated region. (Tr. VI at 231) Nevertheless, when confronted with irrefutable proof, Mr. Varner admitted that BellSouth was in fact paying in Tier I remedies for these two measures in Georgia. (*Id.* at 240-241) Mr. Varner, however, claimed that he didn't know how BellSouth determined Tier I remedies for those two measures. (*Id.* at 243)

Since BellSouth is in the position of the monopolist and has made clear its position it does not believe a remedy plan is needed, it is vital that all claims by BellSouth that its systems operate blindly be verified before any measures are excluded from the remedy plan. An audit by an independent third party should be conducted to validate BellSouth's claim that certain measures provide parity by design.

Additionally, BellSouth's SEEM inappropriately excludes the following enforcement measures from Tier I remedies:

- Loop Makeup -- Response Time -- Manual
- Loop Makeup -- Response Time -- Electronic
- Acknowledgement Message Timeliness
- Acknowledgement Message Completeness
- Percent Flow-through Service Requested
- Invoice Accuracy
- Mean Time To Deliver Invoice
- Usage Data Delivery Accuracy
- Reject Interval
- FOC Timeliness
- Cooperative Acceptance Testing - % xDSL Loops Tested

Moreover, Mr. Varner admitted that the SEEM plan BellSouth has proposed for permanent adoption, and indeed for evaluation of its 271 application, only includes one ordering measure in Tier I and includes no billing measures for Tier I. (Tr. VI at 276-77) Thus, even though BellSouth will measure its performance on all of the measures in its

SQM, under BellSouth's proposal there would be no consequences for BellSouth's failure to meet its performance obligations on many of them and therefore, no incentive for BellSouth to meet performance standards.

The only alternative for CLECs who are experiencing poor performance in an area BellSouth does not include in its remedies plan would be to bring an action before the Commission. Such an action could at best correct BellSouth's performance prospectively, providing no compensation to the CLEC for the harm it has suffered, and the uncertainties of litigation mean that the threat of such actions would provide little incentive for BellSouth to avoid them. There must be consequences for the failure to perform adequately in regard to all measures that this Commission orders BellSouth to include in its SQM.

BellSouth's object is clear: narrow the measures that are subject to penalties, relax the standards by which penalties will be assessed, and drop measures that count as the penalties increase. While it is neither possible nor desirable to measure each and every step in each and every process involved in the delivery of local telephone service, failure to include an adequate sampling of key performance criteria in the measures subject to a remedy plan would permit, and indeed, encourage BellSouth to perform well on the measures that "count," without providing BellSouth an incentive to be diligent about providing nondiscriminatory service in other areas. Such "gaming" of the process must be avoided.

The Florida Commission rejected BellSouth's position and ordered that Acknowledgment Timeliness, Acknowledgement Completeness, Reject Interval, Firm Order Confirmation Timeliness, Cooperative Acceptance Testing -% xDSL Loops Tested and Mean Time to Deliver Invoice be included as Tier 1 measures in its remedy plan.

(*Florida Order* at 95-99, Attachment 6) There is no reason that the CLECs and customers in Kentucky should receive less protection than those operating in other states. Should the Commission determine that it is not appropriate to include all measures in the designated categories as enforcement measures, it should at a minimum require that the measures identified above be included in Tier 1 of the remedy plan it adopts.

ISSUE: SHOULD REMEDIES APPLY TO PERFORMANCE MEASURES THAT REFLECT MANUAL AND PARTIALLY MECHANIZED PROCESSING?

Partially mechanized orders are orders submitted electronically, but fall out of the process for manual intervention by a BellSouth representative. Partially mechanized orders are designed by BellSouth to fall out of its systems for manual processing. Manual orders are submitted via fax machine. (Varner Rebuttal at 100) Discriminatory performance can occur no matter what the level of mechanization. Manual orders can represent key aspects of a CLP's business and that in some cases, for example, branded OS/DA, CLECs have no choice but to use non-mechanized ordering. Thus, remedies should be applied to sub-measures that report on manual and partially mechanized order processing. (Bursh Rebuttal at 31)

On the other hand, BellSouth proposes to have automatic penalties apply to fully mechanized orders, but not partially mechanized or manual orders. (Varner Rebuttal at 99). BellSouth argues that virtually anything could be ordered manually and that partially mechanized orders are more complicated orders that are designed to fall out for manual processing. (*Id.*) BellSouth also argues that the complexity of manual and partially mechanized orders could vary widely and therefore automatic penalties should not apply. BellSouth argues that these types of orders are subject to all other available remedies if a problem exists with them. (*Id.* at 100) BellSouth further argues that

partially mechanized and non-mechanized methods of submission are subject to gaming by CLECs. BellSouth suggests that LSRs can be submitted with known errors in such a way as to guarantee a penalty payment. (*Id.*) BellSouth argues that 75% of the total orders processed, are fully mechanized so the dispute here is over the remaining 25% of orders. (*Id.* at 99)

This Commission should be unwilling to allow 25% of CLEC orders to go without a remedy simply because of the manner in which the order is placed. Allowing BellSouth to avoid remedies on 25% of CLEC transaction would not provide BellSouth with any incentive to improve its level of mechanization. The concerns expressed by BellSouth regarding the complexity of partially mechanized and manual orders can be addressed by allowing for longer intervals for the processing of partially mechanized and manual orders. After being presented with the same arguments from BellSouth, the Florida Commission required that BellSouth pay penalties for failures in the partially mechanized and manual categories on two ordering metrics-O-8 Reject Interval and O-11 FOC and Reject Response Completeness. (Florida Order at 102) This Commission should require no less from BellSouth.

ISSUE: WHEN SHOULD ANY REMEDY PLAN ADOPTED BY THE COMMISSION GO INTO EFFECT?

BellSouth maintains that remedies should only be adopted to prevent backsliding once BellSouth has entered the long distance market. (Varner Direct at 81) A well-developed remedies plan, however, serves several important purposes.

First, it promotes the initial development of competition by providing the incentive for BellSouth to allow nondiscriminatory access to its network required by Section 251 of the Act. (Bursh Rebuttal at 63) The ability to offer customers at least the same level of

service that they would receive from BellSouth is critical to CLEC efforts to attract and retain customers.

Second, once competition develops, self-enforcing penalties help to guarantee that BellSouth will continue to provide CLEC customers with the same quality service it provides to its retail customers. (*Id.* at 64)

Third, where BellSouth does provide discriminatory or non-parity service to CLEC customers, remedies are paid to CLECs to partially defray the additional costs attributable to inferior service provided by BellSouth. These costs include additional internal costs to resolve problems attributable to BellSouth's sub-par performance, in addition to credits given to customers to keep the customers' good will when service problems arise.¹¹ (*Id.*)

Fourth, uncovering discriminatory service may lead to the discovery of underlying problems in BellSouth's systems and/or procedures. Once such problems are identified, remedies provide the incentive for BellSouth to address them head-on rather than to simply implement quick, short term fixes. (*Id.*)

Fifth, rather than waiting for problems to be discovered, the prospect of remedies for discriminatory performance will provide an incentive for BellSouth to take proactive steps to avoid providing poor quality performance to CLECs. Finally, adverse consequences for discriminatory behavior will discourage backsliding once BellSouth has attained approval to enter the inter-LATA market. The varied purposes served by a remedies plan make it essential to institute such a plan as soon as possible. (*Id.*)

BellSouth does not believe that an enforcement plan is needed for deterrence. Mr. Varner argues that CLECs have a number of ways they can seek relief if BellSouth provides them discriminatory performance. (*Id.* at 289-290) Mr. Varner argues that BellSouth's desire gain the authority to provide long distance service in Kentucky is a powerful incentive for BellSouth to provide nondiscriminatory access to all CLECs in Kentucky.

¹¹ Of course, low quality service and repeated service problems causes harm to a CLEC's reputation in ways that cannot be repaired through monetary sanctions.

(Varner Direct at 81) BellSouth, however, has the obligation to provide parity service to CLECs under Section 251 whether or not BellSouth applies for 271 relief.

Contrary to BellSouth's contention, nothing in the Act or the FCC's Orders prohibits this Authority from implementing an enforcement plan to ensure that BellSouth complies with its obligations to provide parity service under Sections 251 and 252 of the Act. In fact, Dr. Taylor acknowledges that the Georgia, Florida and Louisiana Commissions directed that their enforcement plans would be effective prior to BellSouth receiving authority to offer long distance service. (Tr. V. 1 at 332-333)

By delaying implementation of the penalty plan adopted by this Commission until after BellSouth enters the long distance market, the Commission would forego the opportunity to enable more rapid development of competition. Many CLECs are currently experiencing problems with the quality of service they are receiving from BellSouth. These problems make it more difficult for CLECs to attract and retain customers. An appropriate penalty plan in effect now will encourage BellSouth to provide nondiscriminatory service during the critical early stages of competition, while providing some compensation to CLECs for the additional costs they incur when BellSouth's performance falls short.

ISSUE: SHOULD REMEDY PAYMENTS APPLY FOR LATE, INCOMPLETE, OR ERRONEOUS PERFORMANCE REPORTS AND RAW DATA?

The CLECs believe that the enforcement plan adopted by this Commission should include penalties for late, incomplete and inaccurate reporting. The primary goal associated with this specific remedy is to motivate BellSouth to submit accurate performance data and reports on the agreed upon due date. (Bursh Rebuttal at 62). As Ms. Bursh testified, CLECs have already experienced the late submission of performance reports by BellSouth. In addition, some of the performance reports posted by BellSouth have been inaccurate and incomplete. (*Id.*)

BellSouth does not believe that the remedy plan should include penalties for late, incomplete or inaccurate reporting. (Varner Direct at 105). Mr. Varner testified that there is little evidence that late reporting is harmful to the CLECs or the Commission. He argues that the increasing complexity of measurements and sub-metrics, the volume of data processed and the validation of reports prior to posting, impose additional burdens on BellSouth that should not be subjected to a penalty. (*Id.*)

Moreover, Mr. Varner argues, the definitions of “incomplete” or “inaccurate” are so imprecise that there would likely be an ongoing administrative burden each month to determine what is incomplete or inaccurate. (*Id.*) BellSouth contends that it will make every effort to post reports by the due date, but that it should not be subject an automatic penalty for the late posting of reports because there is little evidence that late is reporting is harmful to CLECs or the Commission. (*Id.*) Similarly, BellSouth asserts that it should not be subject to automatic penalties for posting incomplete or inaccurate reports because applying a penalty, once an error has been corrected or a report has been completed would discourage such corrections, even if they were appropriate. (Varner Rebuttal at 105)

Nevertheless, Mr. Varner’s states that BellSouth would be willing to accept the \$2000 a day for late posting of reports and \$400 a day for the incomplete or inaccurate posting or reports and performance data in Staff’s proposal, so long as it applies to the aggregate of all reports, is ridiculous. (*Id.* at 104, 106) The purpose of this penalty, however, is to motivate BellSouth to meet its performance reporting obligations, not to find an amount that BellSouth is comfortable with paying as a cost of doing business. Common sense suggests that in order to affect behavior, any consequence must be set at a level that the party does not wish to pay, otherwise the desired result will not be achieved. Thus, penalties

of \$2000 and \$400 a day for the aggregate of late reports, and inaccurate or incomplete reports or performance data, which BellSouth is apparently willing to pay, would not be adequate to motivate BellSouth to meet its performance reporting obligations.

One of the key functions of an effective remedy plan is to motivate an ILEC to provide parity service to CLECs. BellSouth's posted performance data and reports are the most effect means available to CLECs' and this Commission to ensure that BellSouth is complying with designated performance standards and providing parity service to CLECs as required by the Act. BellSouth's posted performance data and reports are also the best means by which CLECs can identify issues regarding BellSouth's systems, processes and performance that need to be addressed. If this information is not provided to CLECs by the due date, or is incomplete or inaccurate when provided, the ability of the CLECs and the Commission to determinc if BellSouth is providing parity service is hindered. Morcover, problems that affect a CLECs ability to service its customers cannot be detected or corrected in a timely manner.

Additionally, all parties agree that the self-effectuating nature of an enforcement mechanism is essential to its success. However, the self-executing nature of the remedy plan will likely be compromised if BellSouth does not meet its obligation to post performance data and reports by the due date. CLECs should not be put in the position of having to approach the Commission to force BellSouth to provide performance data and reports as required in the enforcement plan. Therefore, BellSouth should be required to comply with all reporting deadlines ordered by the Commission or pay a penalty for failing to do so.

The \$5000 and \$1000 amounts included in the CLEC plan represent the amounts that the CLECs think are necessary to motivate BellSouth to comply with its reporting obligations. As Ms. Bursh testified, the SWBT plan includes a payment of \$5000.00 for every day past the due date a report is late and \$1000.00 per day for each missing performance results. (Bursh Rebuttal at 62) It is critical, however, that the Commission set penalty amounts for late, inaccurate, and incomplete posting of reports and data that are sufficient to motivate BellSouth to comply with its reporting obligations. Otherwise, the self-enforcing mechanism of the remedy plan will be hampered, because neither CLECs, nor the Commission, will be able to properly monitor BellSouth's performance. (Id. at 62-63)

Moreover, any penalty amount this Commission orders BellSouth to pay for late reporting should be assessed for each individual report that is not posted by the required due date. Other states have adopted these additional consequences to help ensure the smooth operation of their performance measurement plan. This Commission do so as well.

ISSUE: WHAT IS THE APPROPRIATE MECHANISM FOR ENSURING THAT ALL PENALTIES UNDER TIER 1 AND TIER 2 ENFORCEMENT MECHANISMS HAVE BEEN ACCOUNTED FOR AND PAID BY BELLSOUTH?

The CLECs believe that in order to provide BellSouth with a continuing incentive to meet designated performance standards, the Commission should have an independent auditing and accounting firm certify, on a random basis, that all penalties under Tier I and Tier II are properly and accurately assessed and paid in accordance with Generally Accepted Accounting Principles. (Bursh Rebuttal at 60-61) Simply providing for an annual audit as proposed by BellSouth and Staff is insufficient. If BellSouth is not accurately determining and paying penalties, given the circumstances some CLECs are in currently, having to wait twelve months for validation of BellSouth's remedy payments could have devastating

consequences. Consequently, the Commission should order random audits to ensure the accuracy of BellSouth's penalty payments. (*Id.*)

ISSUE: WHEN SHOULD BELLSOUTH BE REQUIRED TO MAKE PAYMENTS FOR TIER 1 AND TIER 2 NONCOMPLIANCE, AND WHAT SHOULD BE THE METHOD OF PAYMENT?

BellSouth should be required to pay all remedies owed by on or before the 15th business day following the due date of the reported performance results upon which consequences are based. (Bursh Rebuttal at 63) BellSouth proposal of sixty days to provide the CLECs with checks is absolutely unreasonable. (Varner Direct at 102) BellSouth offers no explanation for needing such an extended period of time to process a simple check. Consequently, the Commission should reject BellSouth's proposal out of hand.

ISSUE: SHOULD BELLSOUTH BE FINED FOR LATE PAYMENT OF PENALTIES UNDER TIER 1?

If BellSouth fails to make payment by the 15th business day following the due date of the data and reports that the payment is based upon, BellSouth should be liable for accrued interest at a rate of six percent simple interest per annum for every day that the payment is late. BellSouth agreed to this proposal in Florida. (*Florida Order* at 167)

ISSUE: SHOULD PERIODIC THIRD-PARTY AUDITS OF PERFORMANCE ASSESSMENT PLAN DATA AND REPORTS BE REQUIRED?

Comprehensive annual audits of reporting methodology and accuracy of data are required. In addition, BellSouth's adherence to metric change control policies should be reviewed, because the lack of follow-through on such policies would thwart the replication of past metric reports. The audit should cover all reporting procedures and reportable data and should include all systems, processes and procedures associated with the production and reporting of performance measurement results. (Bursh Rebuttal at 61)

Periodic audits need to be addressed at a state level rather than at the regional level. First, many of BellSouth's processes, such as provisioning, repair, and collocation, are handled at the state level. Second, the Commission should be involved in determining the scope of audit, but that would prove difficult for the Commission to implement on a regional basis.

A thorough audit process by a neutral third party will allow CLECs and the Commission to verify that BellSouth is providing accurate data and is appropriately incurring the consequences of the remedies plan adopted by this Commission.

ISSUE: WHAT PERFORMANCE DATA AND REPORTS SHOULD BE MADE AVAILABLE BY BELLSOUTH TO CLECS?

BellSouth should provide CLECs with performance data and reports that include BellSouth's provision of:

- a. Services to BellSouth's retail customers in aggregate;
- b. Services and facilities provided to any BellSouth local exchange affiliate purchasing interconnection, unbundled network elements or resale;
- c. Services and facilities provided to carriers purchasing interconnection, unbundled network elements or resale in the aggregate; and
- d. Services and facilities provided to individual carriers purchasing interconnection, unbundled network elements or resale.

The reports should reflect the outcome of statistical procedures applied to each sub-measure for which a parity determination will be made. Benchmark results should also be reported.

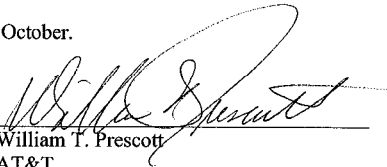
Additionally, access to the raw data used to create performance reports is essential to a CLEC's ability to validate the performance data and reports provided by BellSouth. (Brush Rebuttal at 63) BellSouth admits to not providing the raw data for all the measures in its SQM. Mr. Varner testified that BellSouth provides raw data underlying performance data and reports, **only** to the extent such reports are derived from BellSouth's Performance

Measurement Analysis Platform (PMAP). (Varner Direct at 74-75.) But BellSouth determines what goes into PMAP. An effective remedy plan should provide performance reports and the supporting raw data for all measures in the plan. BellSouth's SEEM does not.

CONCLUSION

For the forgoing reasons, the Commission should adopted the Performance Incentive Plan proposed by AT&T and WorldCom. Additionally, the Commission should adopt the Performance Measures and Standards proposed by AT&T and WorldCom to conduct its evaluation of BellSouth's readiness for 271.

Respectfully submitted this 15th day of October.



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